Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-96

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, EVERETT A. BROUILLETTE, EDWARD B. CAMPBELL, WILLIAM ELLETT, NEAL A. EASTER, ELMER GUNTER AND DORIS RODEN, *Petitioners,*

v.

Robert A. Frosch

ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION; CHAIRMAN AND MEMBERS, CIVIL SERVICE COMMISSION, *Respondents,*

and

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES, *Intervenor-Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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(ii) delete the requirement for advance notification of, or consent to, any subcontracts which were evaluated during negotiations except in contracts for major system acquisition (as defined in 1-201.41) or subsystems or components thereof;

(iii) require extraordinary Government surveillance in exceptional cases of subcontracts or classes of subcontracts selected during negotiation. In this event, insert as paragraph (h) of the clause in 7-104.23(a), the additional paragraph in 7-104.23(b).

(2) Consent is also required for the following additional subcontracts under cost-reimbursement and letter contracts, unless the contractor's procurement system has been approved except in contracts for major systems acquisition (as defined in 1-201.41) or subsystem or components thereof, notwithstanding procurement system approval, consent will be required: * * *

(End of Text)

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CONTRACT SERVICES: APPEALS COURT UPHOLDS NASA IN SUIT OVER LEGALITY OF SUPPORT CONTRACTS

The American Federation of Government Employees loses an important round in its legal battle to have employees of several National Aeronautical and Space Administration contractors declared civil service employees, as the U.S. Court of Appeals for the District of Columbia Circuit overturns a lower court ruling which declared 22 such contracts and portions of two others invalid. (AFGE Lodge 1858, et al v. James E. Webb, Administrator, NASA, et al; CA-DC, 3/20/78)

The appeals court finds that NASA had broad Congressional authorization to enter into technical service contracts and that the employees of the contractors in question were in fact not under the functional control of NASA, as the union argued.

The decision is the latest in the long litigational history of a 1967 reduction-in-force at the Marshall Space Flight Center in Huntsville, Alabama. 166 government employees were RIFed, and they contended they should have been allowed to bump employees of contractors, as the contractor-employees, they alleged, were actually controlled by NASA and were employed under such conditions that they were functionally civil service workers.

In 1966 the U.S. District Court for the District of Columbia found that 22 of the 32 contracts were totally illegal because NASA exercised effective employer control over their employees, and that two of the contracts were illegal in part. The district court held the remaining eight contracts were valid.

The district court, in reaching its decision, applied six criteria set out by the Civil Service Commission for determining whether an agency's relationship to employees was as a direct employer or as a recipient of contracted services performed by employees not under the agency's control.

The six criteria were set out by Leo Pellerzi, who was CSC general counsel in 1967 and is now AFGE general counsel, and the criteria are referred to as the "Pellerzi standard."

The six criteria are:

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Performance on-site; principal tools and equipment furnished by the Government; services are applied directly to integral effort of agencies or in an organizational subpart in furtherance of agency's assigned function or mission; comparable services meeting comparable needs are performed by civil service personnel in the same or similar agencies; the need for the contracted service can reasonably be expected to last more than one year; the nature of the service or the manner in which it is provided requires government direction or supervision of contractor employees.

NASA Appeals

The Appeals Court finds error in the district court's ruling that the contracts in question met the Pellerzi standard and in the union's argument that NASA did not have statutory authority to employ contractors to perform the work in question.

Congress Intended Contracting

The appeals court finds that Congress' charge to NASA was broad and envisioned use of contractors for much of the agency's work: "Congress gave NASA a specific, giant task in need of quick fulfillment and broad power to enter into contracts as necessary for the performance of its work on such terms as the Administrator thought appropriate."

Congress reaffirmed its intention that NASA should use contract employees as well as civil service employees, the appeals court finds, when, during budget hearings for Fiscal Year 1967, NASA told the Senate Committee on Aeronautical and Space Sciences that the 16,800 contract employees working in FY 1965 would be increased to 22,400 in FY 1966 and to 24,900 in FY 1967.

Those contractor employees, the appeals court finds, were to supplement NASA civil service employees, for which there was a personnel ceiling.

The only question then, the appeals court finds, is whether the employees were under the control of the authorized contractors, or actually controlled by NASA. The appeals court finds that NASA did not actually control the contract employees, and that therefore they were not civil service employees and not subject to bumping by the RIFed employees.

'Supervision' Held Vital Criterion

Of the six Pellerzi criteria for determining whether employees are civil service or under contract, the appeals court finds, "'Supervision' is a criterion that in importance far exceeds the others."

"Employees are distinguished from independent contractors most basically by the detail with which the party for whom the work is eventually produced actually supervises the manner and means by which the work is performed," the appeals court finds," and degree of control or supervision is the principal element that differentiates employees and independent contractors at common law, in the state statutory context, and in the context of other statutes as well. All this is another way of saying that the practice of giving an order for a specific service or article with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is otherwise an independent contractor (such as an employee of a contractor) into an employee."

"Classic Independent Contractor Relationship"

"It was the responsibility of each company," the appeals court finds, "to supervise, control and direct the performance of its own employees in fulfilling the contract's requirements. These contracts required the companies to exercise their independent judgment. This is the classic independent contractor relationship."

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The union's case is further weakened, the appeals court notes, by the fact that AFGE did not challenge the district court's finding that eight of the 32 contracts in question were valid contracts, and as such properly administered.

"Appellee [AFGE] also argues that 'regular civilian work functions' cannot be the subject of support services contracts under subsection (b)(5). Yet appellee does not challenge the district court's decision that eight of the contracts covering, inter alia, security, fire protection, medical services, food services, custodial services, and logistic support were valid subjects of support arrangements... This not only belies appellee's argument," the appeals court states, "but also demonstrates that the crucial question in this case is not merely what functions the contractors performed but is whether NASA treated the other questioned contractors' employees as its own employees."

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FEDERAL AID: HOUSE VERSION OF HUMPHREY-HAWKINS BILL ADDRESSES VARIETY OF FEDERAL AID PROGRAMS

The Full Employment and Balanced Growth Act of 1978, otherwise known as the Humphrey-Hawkins bill (HR 50), passed by the House March 16, was amended to require the President to prepare a "comprehensive" public works program.

In line with the Carter Administration's initiatives in federal aid reform this past year, other amendments mandate the President to:

-- Include in an economic report at the beginning of each session of Congress recommendations for legislation and administrative reform to improve agency operation; and

-- Make recommendations for legislation to reduce or eliminate procedural requirements applicable to public works programs and projects;

-- Another amendment insures that in countercyclical employment policies, sufficient funds are allocated for special concerns of non-urban areas, while still another requires stimulation of private before public sector employment, with an emphasis on rural development, small business, and ethnic and minority-owned and operated firms.

-- Also among the amendments tacked on to the bill is one that strikes certain language that could lead to the confusion of the term "countercyclical" with current programs such as countercyclical revenue sharing.

With respect to the amendment mandating the President's preparation of a public works program, it first appeared in the 1976 version of the bill, but was struck when the bill was reintroduced this year. The rationale behind its restoration is, according to the amendment's sponsor, Rep. Ray Roberts (D-Tex), that programs funded through the Comprehensive Employment Training Act are less productive than public works programs.

The amendment also contains a stipulation that the public works program involve matching grants to local governments of not more than 80 percent of the cost of the projects. This means that any participating contractor would have to agree that no less than 20 percent of the employees working on such a project would be unskilled individuals. "Public works projects by private contractors do not result in a permanent bloated bureaucracy," Roberts reasoned. "They do not pad Government payrolls, nor create permanent federal jobs."

Minimizing Red Tape

Introduced by Rep. James Cleveland (R-NH), the two amendments mandating the President to recommend ways of reducing procedural requirements and upgrading agency operation are intended to minimize or eliminate red tape.

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NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES, *Intervenor-Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Lodge 1858, American Federation of Government Employees, Everett A. Brouillette, Edward B. Campbell, William Ellett, Neal A. Easter, Elmer Gunter and Doris Roden, hereby respectfully petition the Supreme Court of the United States to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 20, 1978 and said Court's denial, on April 19, 1978, of petitioners' applications for rehearing.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. Said opinion is included in the appendix to this petition, and as demonstrated hereinbelow, said opinion is in direct conflict with the gravamen of an earlier opinion of the Court of Appeals rendered in this same case, which is reported under the caption *Lodge 1858, American Federation of Government Employees* v. *Paine,* 141 U.S. App. D.C. 152, 436 F.2d 882 (1970). The decision of the District Court, which was based on the Court of Appeals' 1970 decision and which was reversed by the Court of Appeals' 1978 opinion now before this Court for review, is reported under the caption *Lodge 1858, American Federation of Government Employees* v. *NASA,* D.C., D.C., 1976, 424 F. Supp. 186.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Court of Appeals were rendered on March 20, 1978. Petitions for rehearing were denied on April 19, 1978. Jurisdiction to review the judgment by writ of certiorari is conferred on this Court by Title 28 U.S.C. 1254(1), this petition having been filed within ninety days after the Court of Appeals denied petitioners' applications for rehearing on April 19, 1978 in the manner prescribed by Title 28 U.S.C. 2101(c).

QUESTIONS PRESENTED FOR REVIEW

This petition presents for review the following questions of vital importance to the entire federal Civil Service system and to the management and operation of the National Aeronautics and Space Administration under the National Aeronautics and Space Act of 1958,

as amended (42 U.S.C. 2473(b), now (c)) and the federal Civil Service laws—questions of federal law which have not been, but should be settled by this Court, particularly in light of the two conflicting opinions of the Court of Appeals in this same case, and the dramatic conflicts between the Court of Appeals' 1978 opinion and other prior decisions of this Court and the Court of Appeals:

1. Is the National Aeronautics and Space Administration (NASA) required, like other civilian departments and agencies of the Federal Government, to perform its regular civilian governmental work functions with employees appointed and employed under the federal Civil Service laws and regulations—or may NASA ignore and circumvent the Civil Service laws and obtain thousands of the clerks, secretaries, blue collar workers and civilian technical and professional employees it regularly needs to perform its civilian governmental functions through scores of private contractors, at great additional cost to the Government?

2. Is NASA specifically required by its own organic statute, the National Aeronautics and Space Act of 1958 as amended (42 U.S.C. 2473(b)(2), now (c)(2)), to employ all but 425 of its regular civilian employees under the Civil Service laws and to pay them in accordance with the Classification Act of 1949, as amended?

3. In this regard, a two-judge panel of the Court of Appeals (Robinson and Tamm, C.J.) ruled in this case in 1970 (436 F.2d 882, 892):

> "When Congress created NASA and authorized it to appoint and fix the compensation of such offi-

> cers and employees as may be necessary to carry out [its] functions, it *mandated explicitly that 'such employees shall be appointed in accordance with the civil service laws.'* Even to give NASA a degree of flexibility in staffing, Congress has excepted but 425 of the many thousands of NASA jobs from the civil service laws. And while thus so overwhelming./ subjecting NASA to the civil service laws, Congress has specifically rejected Administration requests that the federal salary laws be waived for all officers and employees of the new agency."

After lengthy trial proceedings, the District Court meticulously followed the Court of Appeals' 1970 ruling in this respect (424 F.Supp. 186 (1976)), but another two-judge panel of the same Court of Appeals (MacKinnon and Robb, C.J.) reversed, holding that 42 U.S.C. 2473 (b)(2), now (c)(2)), does not prevent NASA from contracting out vast portions of its regular, day-to-day civilian governmental work functions to private contractors who simply provide clerks, typists, computer operators, guards, etc., for a fee.

Considering the vital importance of these conflicting rulings to NASA and its entire civilian force of employees—and the crushing impact the 1978 decision of the Court of Appeals will have on the Civil Service system generally—should not this question be settled by the Supreme Court of the United States?

4. Assuming NASA was precluded by the federal Civil Service laws and/or its own organic statute (42 U.S.C. 2473(b)(2), now (c)(2)) from staffing its regular civilian governmental work force with thousands of non-Civil Service employees provided by private contractors for costly fees, would that practice nevertheless become perfectly legal merely be-

cause Congress provided funds in *annual appropriation measures* which NASA used to pay the contractors?

Since the Court of Appeals' 1978 opinion in this case so holds, is not review by this Court also essential to resolve the gaping conflict thus created between that decision and this Court's decision in *United States* v. *Langston,* 118 U.S. 389, 394, as well as between that decision and the Court of Appeals' earlier decision in *Committee For Nuclear Responsibility, Inc.* v. *Seaborg,* 463 F.2d 783, 785?

5. Finally, the Court of Appeals' 1978 opinion in this case holds that whenever a district court, confronted with important questions under federal statutes such as the Civil Service laws, defers its judgment on the merits to permit the federal agency charged with administration of such statutes to review the facts and issue preliminary conclusions for the court's consideration, the court is absolutely bound by the agency's findings and conclusions and is powerless to correct or reject same even if they are clearly erroneous as a matter of law.

That ruling is in direct conflict with the Court of Appeals' 1971 decision in *Wheelabrator Corp* v. *Chafee,* 147 U.S. App. D.C. 238, 455 F.2d 1306, 1316, wherein the court emphasized that, in all such cases, *"the court has the last word"* (455 F.2d 1316, 17).

Again, therefore, is not review by this Court essential to correct this patent error in the Court of Appeals' 1978 opinion in this case, and to settle the aforesaid conflict in this vitally important area of federal administrative law and procedure?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves NASA's organic statute, the National Aeronautics and Space Act of 1958 as amended (42 U.S.C. 2473 (b)(2) and (5), now (c)(2) and (5)), and various basic provisions of the federal Civil Service laws and regulations, the most important of which are printed in the Appendix.

STATEMENT OF THE CASE

When Congress passed the National Aeronautics and Space Act of 1958 (42 U.S.C. 2451 et seq), which authorized the creation of NASA and prescribed its new "space age" functions, it specifically ordered NASA to perform its regular agency work with employees "appointed in accordance with the civil service laws" and paid as prescribed by the Classification Act (42 U.S.C. 2473(b)(2), now (c)(2)).

By 1967, however, NASA had ignored and violated that statutory directive to the point where more than 50% of its regular everyday civilian governmental work force at the Marshall Space Flight Center in Alabama consisted of non-Civil Service employees provided by a long list of private contractors at a cost to NASA of $70 million per year. These non-Civil Service employees consisted of regular clerks, typists, blue collar workers and technical and professional white collar workers—all of whom were readily available for employment through the regular Civil Service system.

The same situation prevailed at NASA's Goddard Space Center near Washington, D. C., so both the Comptroller General of the United States and the Civil Service Commission commenced in-depth investigations (J.A. 248-363). Both independent federal agencies ruled that NASA's personnel contracts violated NASA's organic statute (42 U.S.C. 2473(b)(2), now (c)(2)), the Civil Service laws and the federal pay schedules contained in the Classification Act (J.A. 248-363)—and the Comptroller General ruled that NASA's contracts were resulting in unnecessary, multimillion-dollar losses for the Government each year (J.A. 260-294). NASA promptly advised both the Comptroller General and the Commission that it planned to "take all necessary action to have these functions performed by Civil Service employees" (J.A. 17).

Shortly thereafter, however, NASA scheduled a Reduction-In-Force among its complement of Civil Service employees at the Marshall Space Flight Center in Alabama pursuant to which 764 federal Civil Service employees were to be removed from their positions while thousands of competing non-Civil Service employees, performing essentially the same work for NASA at the Marshall Center, would be retained to perform the available work (J.A. 17).

Six of the Civil Service employees involved in the pending Reduction-In-Force and their union, Lodge 1858, American Federation of Government Employees, brought the instant action for injunctive relief and a declaratory judgment that the numerous contracts pursuant to which NASA had obtained non-Civil Service employees to succeed to the available work at the Center are illegal under both NASA's organic statute and the Civil Service laws. The late Judge Holtzoff of the District Court in Washington granted a preliminary injunction against the scheduled RIF (J.A. 152, 153).

NASA and the Civil Service Commission, defendant-respondents in this case, thereupon voluntarily agreed to cancel 598 of the 764 pending reduction-in-force actions, stating in a formal memorandum to the district court that they were satisfied that all but 166 of those actions involved *"improper service contract operations"* (J.A. 188, 189; 1196).

Judge Holtzoff thereupon dismissed the complaint, holding that the remaining 166 Civil Service employees must exhaust their administrative remedies before the Civil Service Commission, and that their union had no standing to continue to maintain the suit alone (J.A. 197-218).

Upon appeal, the Court of Appeals (Robinson and Tamm, C.J.) reversed Judge Holtzoff, and held that both the individual plaintiffs and their union had standing to continue the suit for declaratory judgment regarding the legality of NASA's personnel contracts at the Marshall Center, some of which had already been declared unlawful by both the Comptroller General and the Civil Service Commission (*Lodge 1858, AFGE* v. *Paine,* 141 U.S. App. D.C. 152, 436 F.2d 882 (1970)). In the course of its 1970 opinion, the Court of Appeals specifically construed NASA's organic statute (42 U.S.C. 2473(b)(2), now (c)(2)) as follows, at 436 F.2d 882, 892:

> "When Congress created NASA and authorized it to 'appoint and fix the compensation of such officers and employees as may be necessary to carry out such functions,' *it mandated explicitly that '[s]uch officers and employees shall be appointed in accordance with the civil service laws.' Even to give NASA a degree of flexibility in staffing, Congress has excepted but 425 of the many thousands of NASA jobs from the civil service laws. And while thus so overwhelmingly subjecting NASA to the civil service laws, Congress has specifically rejected Administration requests that the federal salary laws be waived for all officers and employees of the new agency* (See H.Rep. No. 1770, 85th Cong., 2d Sess., at 18 (1958); H.R. Rep. No. 1170, 87th Cong., 1st Sess., at 7-9 (1961)." (Italics supplied.)

Upon remand, the district court (Waddy, J.) meticulously followed the Court of Appeals' 1970 interpretation of NASA's organic statute, and after lengthy, voluminous proceedings on the merits, he ruled (like the Comptroller General and the Civil Service Commission had theretofore done) that NASA's organic statute and the federal Civil Service laws compel NASA, like other federal civilian agencies, to appoint and pay its regular civilian work force under the Civil Service laws and the Classification Act (*Lodge 1858, AFGE* v. *NASA,* 424 F. Supp. 186 (1976)). Also, as the Commission and the Comptroller General had done in other similar, if not identical NASA contract cases, the district court found support service contracts made by NASA with 22 private corporations merely to furnish, for huge fees and profits, typists, clerks, etc., to perform NASA's regular civilian work functions at the Marshall Center to be unlawful (424 F. Supp. 186).

Now, after more than 10 years of litigation and completely contrary to the Court of Appeals' 1970 opinion, the district court's opinion and the detailed rulings previously issued by the Comptroller General and the Civil Service Commission, the Court of Appeals' 1978 opinion (written by Judge MacKinnon for a two-judge panel) suddenly finds 42 U.S.C. 2473(b)(2) and the Civil Service laws generally to be

mere *"statutory surplusage."* In Judge MacKinnon's view, because 42 U.S.C. 2473(b)(5), in typical *boilerplate language,* authorizes NASA to enter into *"contracts, leases, cooperative agreements, or other transactions" generally,* NASA automatically has the right, irrespective of the clear-cut restrictions of 42 U.S.C. 2473(b)(2), to obtain its entire force of federal civilian employees, if necessary, from private contractors.

In sum and substance, Judge MacKinnon's clearly erroneous interpretation of both NASA's organic statute and the Civil Service laws effectively repeals the statutory mandate of 42 U.S.C. 2473(b)(2), now (c)(2)), and licenses NASA (*and impliedly all other federal agencies possessed of the power to contract generally*) completely to ignore the requirements of the Civil Service laws and the salary limitations of the Classification Act in the establishment and maintenance of its regular federal civilian work force.

In one fell swoop, Judge MacKinnon, looking at the very same federal statutes the Comptroller General, the Civil Service Commission, the Court of Appeals (in 1970) and the district court had theretofore construed, found *all* of NASA's so-called "support service contracts" to be lawful ,whereas, as stated above, the two agencies, the Court of Appeals (in 1970) and the district court unanimously reached a directly opposite conclusion.

ARGUMENT

I

NASA, Like Other Civilian Departments and Agencies of the Federal Government, Must Be Required To Perform Its Regular Governmental Work Functions With Employees Employed Under the Civil Service Laws and Paid in Accordance With the Classification Act. The Court of Appeals' Opinion, Which Licenses NASA To Obtain Thousands of Non-Civil Service Employees To Perform Its Regular Governmental Work Through Scores of Private Contractors, Does Violence To the Entire Spectrum of Federal Laws That Were Enacted To Establish and Maintain the Integrity of the Civil Service System, and Raises Massive Issues Which Must Be Settled by This Court.

When the Comptroller General and the Civil Service Commission investigated the type of NASA "support service contracts" involved in this case, they ruled that *"the procurement and use of personnel by unauthorized contracting practices have an adverse impact upon the civil service system and tend to frustrate the purposes and national policies expressed by the personnel laws"* (J.A. 300). They went on to state (J.A. 300):

> "The extensive use of contractor-supplied personnel for the performance of Government missions poses issues of critical importance to our system of government, to any meaningful concept of 'public service' and to the continuing vitality of the civil service system."

The Court of Appeals' 1978 opinion in this case completely ignores those vitally important national considerations, and the fact that massive contracting-out of regular federal agency work functions violates the entire spectrum of federal laws enacted by Congress over the past century to establish, promote and maintain the integrity of the federal Civil Service system.

First of all, it has uniformly been held for decades that the various laws passed by Congress and embodied in Title 5 of the United States Code to govern the staffing of federal agencies, and relations between federal agencies and their employees, are absolutely binding on federal agencies *"unless a clear exception can be found in some statute or other legal authority"* (See 25 Op. Atty. Gen. 341; 26 *id.* 363, 502; and 27 *id.* 95). The *"exception"* must consist of *"clear and affirmative language indicative of the intention of Congress to create an exception from the laws relating to appointment"* (J.A. 344).

The Civil Service statutes themselves specifically provide, at 5 U.S.C. 2102(a):

> "(a) The 'competitive service' consists of—
>
> "(i) *all* civil service *positions* in the executive branch except
>
> "(A) *positions which are specifically excepted from the competitive service by or under statute.*" (Italics supplied.)

Congress then defined "position" for purposes of the Civil Service laws as follows (5 U.S.C. 5102(a)(3)):

> *"Position* means the *work,* consisting of the duties and responsibilities assignable to an employee." (Italics supplied.) [1]

Here, the Court of Appeals found *no statutory* exception which granted NASA authority to remove thousands of *"positions"* from the federal Civil Service. Indeed, it recognized that NASA's organic statute expressly prohibits NASA from performing its regular federal work functions with any more than 425 non-Civil Service employees (42 U.S.C. 2473(b)(2), now (c)(2)). Nevertheless, the Court of Appeals licensed NASA to continue to infiltrate thousands upon thousands of non-Civil Service employees into its regular governmental work force solely because it found that NASA, like most other federal agencies, has the boilerplate right to contract generally. In fact, the Court ruled, *without any supporting precedent of any kind,* that NASA has the power to use that general contracting authority as an *"alternative means of overcoming . . . civil service personnel ceilings" specifically fixed by the Congress* (App., pg. 13a).

But, when NASA attempted to make that same totally specious argument to the Comptroller General and the Civil Service Commission prior to this litigation, those federal agencies, charged with administration and oversight of the federal statutes involved, categorically rejected it, stating (J.A. 295. 296):

> ". . . personal services necessary to perform a Government function are for performance by regular employees of the Government appointed in accordance with the civil service and classification laws; and in the absence of *specific authority* a federal agency is not authorized to contract for personal services without regard to the personnel laws applicable to federal employees generally." (Italics supplied.)

Completely opposite to the Court of Appeals, therefore, the Comptroller General and the Civil Service Commission, the two agencies charged with oversight

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[1] The term *"employee"* is also defined by the Civil Service laws to include any "individual employed *in* or under an agency."

and administration of the Civil Service laws and all operations thereunder, ruled that NASA's vast array of extremely costly personnel contracts are *"ultra vires"* and "illegal" (J.A. 354). Moreover, whereas the Court of Appeals totally ignored or failed to grasp the tremendous adverse impact such illegal personnel contract operations have on the entire spectrum of federal statutes Congress has enacted over the past century to govern relations between the Federal Government and those who perform its regular governmental work functions, the Commission and the Comptroller General emphasized in considerable detail that NASA's unlawful contracting practices—

(1) pervert the ability of the Federal Government to select and maintain employees qualified by character, fitness and loyalty for public service, in violation or circumvention of 5 U.S.C. 3331-3371; 7311;

(2) effectively repeal or render meaningless federal prohibitions against the right of employees of the Government to strike, in violation or circumvention of 5 U.S.C. 3333, 7311, or the right to engage in various types of political activity, in violation or circumvention of 5 U.S.C. 7321-27;

(3) defeat the entire meaning and purpose of the Classification Act, which requires governmental duties and responsibilities to be divided into discrete positions so that equal pay is guaranteed for equal work, in violation or circumvention of 5 U.S.C. 5101-5115;

(4) frustrate, evade and destroy federal statutes that prescribe *uniform* pay schedules, overtime pay, night and Sunday differential pay, subsistence and travel allowances, leave and leave allowances, and fixed health, disability and retirement benefits for employees of the Government, as well as standard performance evaluation procedures for all federal employees, in violation or circumvention of 5 U.S.C. 4301, et seq.; 5331, et seq.; 6301-24; 8101-8348; 8701-16; and 8901-13.

(5) nullify and effectively cancel job retention preference rights for veterans and other civil service employees, in violation or circumvention of the Veterans Preference Act (5 U.S.C. 3309-3319) and 5 U.S.C. 3501-3584, and

(6) dilute, weaken and destroy the Federal Government's labor-management relations program which guarantees honest, effective collective bargaining for all Government employees, in violation and circumvention of Executive Order 10988 and other others issued by the President.

In this regard, the Comptroller General and the Commission concluded prior to this litigation (J.A. 355):

> "It is these principles and policies that are disserved when personnel are unlawfully procured by means of contract to perform duties under circumstances that must be regarded as creating an employer-employee relationship with the government. This is particularly acute when the contractor supplies personnel who work on government premises, use government equipment, and are interspersed with and directed by civil service employees. There is, in such situations, an "interface" between the contractor's personnel system and all facets of the civil service system which is abrasive to employee morale, erosive of civil service laws and policies, and destructive of efficiency and sound management."

In circumstances such as these—where the Court of Appeals' opinion is directly in conflict with prior, detailed rulings of both the Comptroller General and the Civil Service Commission with reference to essentially the same NASA contracts; where the Court of Appeals' opinion, rendered by only a two-judge panel, threatens violence to the entire array of federal statutes enacted by Congress to govern the Civil Service system; where thousands of federal employees, both Civil Service and contractor-supplied, must continue to try to function in an atmosphere charged with illegality and constant friction; where the huge extra costs involved in NASA's personnel contracting system must be borne by American taxpayers, albeit the legality of the entire system is still in grave doubt —plainly this Court should accept this case for review and settle the issues of vital importance to NASA, its entire work force and the Civil Service system generally.

II

In This Case, NASA's Organic Statute Contains a Specific Congressional Mandate That NASA Must Perform All Its Governmental Work Functions With Employees Hired Under the Civil Service Laws and Paid as Required by the Classification Act, Except It May Employ 425 Scientists or Engineers Outside the Civil Service Laws. That Congressional Mandate Was in No Sense Repealed or Rendered Meaningless by Another Provision of the Same Organic Statute Which Simply Empowers NASA to Make Leases and Contracts Generally. The Court of Appeals' Contrary Rulings Thus Raise Vitally Important Issues Under NASA's Organic Statute Which Must Be Settled by This Court.

In Point I, *supra,* it was demonstrated that federal agencies must appoint their regular civilian work force under the Civil Service laws and pay its employees as prescribed in the Classification Act, unless Congress grants a *specific statutory exception.*

In this case, Congress did grant NASA a *partial, limited statutory exception*—in the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. 2473(b)(2), now (c)(2)), Congress authorized NASA to employ no more than 425 scientists and engineers without reference to the Civil Service laws.

That specific, strictly limited exception was granted at NASA's request, to enable NASA to try to catch up with and overtake the Russians in the 1958 space race. But, having granted that exception for 425 "positions" *only,* Congress (in response to concerns expressed by the Chairman of the Civil Service Commission and others) immediately coupled that "exception" with the following unmistakable mandate (42 U.S.C. 2473(b),(2), now (c)(2)):

> "In the performance of its functions, the Administration is authorized . . .
>
> (2) to appoint and fix the compensation of such officers and employees as may be necessary to carry out such functions. *Such officers and employees shall be appointed in accordance with the civil service laws and their compensation fixed in accordance with Chapter 51 . . . and Chapter 53 of Title 5 . . . .*" (Italics supplied.)

Thus in this case, NASA's employment of more than 7,000 non-Civil Service employees at the Marshall Space Flight Center alone to perform its regular, everyday governmental work functions violates not only the Civil Service laws, as demonstrated in Point I, *supra,* but NASA's plain, clear-cut organic statute as well. *Patently, if Congress intended to license NASA to employ more than the designated 425 employees without reference to the Civil Service laws,*

it would have provided an unlimited or unrestricted exception, as for example, it did in the Atomic Energy Commission's organic statute (42 U.S.C. 2201(d))—

> " . . . to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and their compensation fixed *without regard to such laws.*" (Italics supplied.)

Here, Congress excepted 425 positions and no more in NASA's organic statute—and as the lengthy legislative history supporting 42 U.S.C. 2473(b)(2), now (c)(2) shows—Congress did this intentionally and for the specific purpose of strictly controlling NASA, which has been a free-wheeling, wild-spending agency since its very inception.

Certainly, no court can correctly read 42 U.S.C. 2473(b)(5), now (c)(5) of the same NASA organic statute completely to repeal or negate that Congressional mandate so meticulously prescribed in Section 2473(b)(2), now (c)(2). *That boilerplate provision merely gives NASA the same general contracting authority almost all federal agencies possess—namely, the right "to enter into and perform" leases, contracts, deeds and various other types of necessary agreements* (see 42 U.S.C. 2473(b)(5), now (c)(5)).

Indeed, when NASA tried to convince the Comptroller General and the Civil Service Commission prior to this litigation that Section 2473(b)(5) afforded it a license simply to ignore and evade the statutory mandates contained in both the Civil Service laws and Section 2473(b)(2) of NASA's own organic statute, that contention was categorically rejected as follows (J.A. 345):

> "We do not dispute the fact that NASA has authority to contract. This language, however, is not the clear and affirmative language that is required to create an exception from the personnel laws which would authorize the contracts under review. This is obvious when they are read in *pari materia.* Section 2473(b) of 42 U.S.C. also specifically provides (§ 2473(b)(2)) that NASA's employees be appointed in accordance with the civil service laws and their compensation fixed in accordance with the Classification Act of 1949. The same subsection authorizes the appointment of not more than 425 of the scientific, engineering and administrative personnel . . . 'without regard to such laws.' Paragraph 9 of the same subsection (§ 2473(b)(9)) authorizes NASA to obtain services 'as authorized by Section 55a of Title 5' (which authorizes the procurement of temporary or intermittent services of experts or consultants by contract without regard to the civil service and classification laws). Hence, two conclusions are obvious. One is that when Congress wanted NASA to have exceptions from the civil service and classification laws, it provided for the exceptions in clear and unambiguous language; the other is that the provision cited by NASA as authority is not such a clear and unambiguous exception."

And, when NASA made that same contention to the district court in this case, it was again rejected (J.A. 425):

> "Even though Sec. 2473(b)(5) confers upon the Administrator of NASA the right to contract, even 'broadly,' it does not include the right to contract illegally, i.e., in contravention of the express provisions of Sec. 2473(b)(2)."

Here again, therefore, the Court of Appeals' 1978 opinion in this case is directly in conflict with the

prior rulings of the Comptroller General and Civil Service Commission regarding the meaning of NASA's organic statute—and it is in direct conflict, of course, with the district court's ruling which it reversed. Of even greater significance perhaps is the fact that the Court of Appeals' 1978 opinion is also dramatically in conflict with the Court of Appeals' 1970 opinion in this same case. There it is stated (436 F.2d 882, 892):

> "When Congress created NASA and authorized it to appoint and fix the compensation of such officers and employees as may be necessary to carry out such functions, it *mandated explicitly* that 'such officers and employees shall be appointed in accordance with the civil service laws.' Even to give NASA a degree of flexibility in staffing, Congress has excepted but 425 of the many thousands of NASA jobs from the civil service laws. And while thus so overwhelmingly subjecting NASA to the civil service laws, Congress has specifically rejected Administration requests that the federal salary laws be waived for all officers and employees of the new agency."

Plainly, a vitally important issue of this nature under NASA's organic statute, which affects many thousands of employees of that agency and the entire administration of that agency, must be settled by this Court.

III

The Court of Appeals' Opinion Is Also in Direct Conflict With Decisions of This Court and of the Court of Appeals Itself Which Hold That Appropriations Provided by Congress to Fund Federal Activities Do Not Operate to Repeal Other Federal Statutes Which Make Those Activities Unlawful.

In an effort to bolster its clearly erroneous rulings in this case under the Civil Service laws and NASA's

organic statute, the Court of Appeals states in its opinion (App., pg. 13a):

> "NASA and Marshall resorted to support service contracts as the alternative means of overcoming . . . civil service personnel ceilings. This practice was regularly disclosed to Congress in its budget requests and the resulting appropriations based thereon are an indication of Congressional approval."

That holding is in direct conflict with this Court's opinion in *United States* v. *Langston,* 118 U.S. 389, 394 which established the rule that mere appropriations measures, which contain no words that expressly or by clear implication modify or repeal existing statutes, cannot be construed to change or repeal those existing laws. Indeed, the United States Court of Appeals for the District of Columbia Circuit itself ruled in *Committee For Nuclear Responsibility, Inc.* v. *Seaborg,* 463 F.2d 783, 785 in 1975:

> "Congress must be free to provide authorizations and appropriations for projects proposed by the executive even though claims of illegality . . . are pending in the courts. There is, of course, nothing inconsistent with the adoption of appropriations and authorizations measures on the *pro tanto* assumption of validity, while leaving any claim of invalidity to be determined by the courts."

The Court of Appeals' 1978 ruling in this case is thus plainly incorrect, it is in conflict with the aforementioned decisions, and it must be reversed by this Court in response to this petition.

IV

The Court of Appeals' Decision Is Erroneous and in Conflict With Both Prior Court of Appeals Decisions and the Administrative Procedure Act, in That It Holds That Whenever a District Court, Confronted With Important Questions Under a Federal Statute, Defers Its Judgment on the Merits to Permit the Federal Agency Charged With Administration of Those Statutes to Review the Facts and Issue Proposed Conclusions, the District Court Is Absolutely Bound by the Agency's Conclusions and May Not Correct or Reject Same, Even if They Are Plainly Erroneous as a Matter of Law

The Court of Appeals' decision is also in grave conflict with the prior Court of Appeals decision in *Wheelabrator Corp.* v. *Chafee,* 147 U.S. App. D.C. 238, 455 F.2d 1306, 1316, and with the Administrative Procedure Act (5 U.S.C. 706) as well.

In *Wheelabrator,* it was ruled that, in appropriate cases under a federal statute, a district court may withhold its decision on the merits until it obtains guidance or even an advisory ruling on the issues from a federal agency with special competence in the field. The Court of Appeals emphasized, however, that *"the court (still) has the last word"* (see 455 F.2d 1316, 17). Thus, under *Wheelabrator* and the Administrative Procedure Act (5 U.S.C. 706), if the district court finds the advice or ruling it receives from a federal agency to be erroneous, arbitrary, capricious, contrary to the evidence or otherwise unwarranted, the court may correct the agency's findings and enter an appropriate judgment of its own (see 455 F.2d 1317).

In this case, however, Judge MacKinnon erroneously ruled that, under *Wheelabrator,* the court does *not* have the last word—that having elected to seek advice or a ruling from a federal agency, *it is absolutely bound* by the agency's findings (App., pg. 27, 28a). Judge MacKinnon goes on to state that when the district court followed *Wheelabrator* in this case and sought a preliminary advisory investigation of the facts and ruling from respondent Civil Service Commission, it made the Commission the equivalent of a *"special master"*—and thus, under Rule 53(e)(2) F.R.C.P., the district court was powerless to change or correct the Commission's findings albeit Judge MacKinnon himself actually concedes the Commission's findings were at least partially incorrect (App. pg. 29a).

Judge MacKinnon, of course, cites no precedents whatsoever for his rulings because (a) they are plainly grossly erroneous and (b) there are no precedents whatsoever for his baseless premise. *Wheelabrator, supra,* is an extremely important, time-conserving doctrine in cases involving administrative law and procedure. Its vitality and usefulness have been seriously crippled by Judge MacKinnon's erroneous rulings in this case.

Ergo, it is imperative for this Court to resolve this additional grave conflict between the Court of Appeals' decision in this case, on the one hand, and *Wheelabrator* and the Administrative Procedure Act on the other.

Indeed, prior to Judge MacKinnon's erroneous decision in this case, even respondents NASA and NCTSI did not contend the district court was absolutely bound by the Commission's preliminary report. Their sole contention was that said report *"should be given great weight by the court"* (see 424 F. Supp. 193). The district court thereupon gave the Commis-

sion's report "great weight," but ruled, correctly we submit (424 F. Supp. 194):

> ". . . great weight should be given to the Commission's finding and conclusions because it is an agency 'with special competence in the field.' The final determination of whether these contracts constitute the procurement of personal services proscribed by the personnel laws, however, rests with the court."

V

The District Court Meticulously Followed the Same Laws, Rules and Standards Followed by the Comptroller General and Civil Service Commission to Find Numerous Substantially Identical NASA Support Service Contracts Illegal, and Its Findings Were Based Exclusively on Facts and Evidence Developed by the Civil Service Commission in This Case. The Court of Appeals Reversed Solely Because It Erroneously Interpreted the Applicable Law and Distorted the Evidence Produced by the Commission.

When the Court of Appeals remanded this case to the district court in 1970, the district court went to extraordinary lengths to follow (a) the rules of law and directives found in the Court of Appeals' 1970 opinion (436 F.2d 882) and (b) the same laws, rules and standards followed in the prior investigations of almost identical NASA support service contracts by the Comptroller General and Civil Service Commission (J.A. 248-362).

In line with *Wheelabrator, supra,* it deferred judgment on the merits until respondent Civil Service Commission developed the facts relevant to the NASA contracts involved in this case and reported back to the court (424 F. Supp. 186, 191).

During the Commission study, counsel for respondents NASA and the Commission intentionally tried to misdirect and mislead the Commission's fact-finders by requiring that they utilize different standards than those used in the prior investigations (424 F. Supp. 186, 191-192). The Court, however, rejected those misdirections and ordered the Commission to adhere to the established standards (424 F. Supp. 186, 191-192).

Finally, the Commission fact-finders reported back to the court. *They advised the court that 22 of the 32 NASA contracts investigated met 5 of the 6 Commission standards for illegality;* and upon review of the report under *Wheelabrator, supra,* the court ruled that solely *because the investigators arbitrarily insisted on following the misdirections of their own counsel which the court had rejected, did they fail to find that said 22 contracts violated all 6 of the established Commission standards for contract illegality* (424 F. Supp. 186, 195-196). Then, having examined each contract individually and all evidence produced by the Commission's report, and after setting forth its findings and conclusions in a lengthy opinion, the District Court ruled (424 F. Supp. 186, 217-218):

> ". . . plaintiffs are entitled to summary judgment with respect to those support service contracts establishing the proscribed employer-employee relationship; and further, that defendants and intervenor-defendant NCTSI are entitled to summary judgment with respect to those contracts found not to have established that relationship."

The Court of Appeals *erroneously totally ignored 5 of the 6 standards regularly applied by the Commis-*

sion to determine contract illegality, and incorrectly concluded, at page 16 of its opinion (App., pg. 18a):

> "'Supervision' is a criterion that in importance exceeds the others."

Judge MacKinnon then went on to establish a completely new definition of *"supervision"* that is vastly different from the definition of "supervision" found in the Civil Service laws and all prior Comptroller General and Commission rulings with reference to NASA contracts. Prior to this litigation, the Commission ruled (J.A. 329):

> "In our review of operations under these contracts, it became even more evident that contracts such as these *cannot* be performed *unless* the civil servants who are supported on the job have the right *to direct* the work of the contractor." (Italics supplied)

In its opinion, the Court of Appeals rejected that concept and stated (App., pg. 18a):

> ". . . supervision means control of the individual workman's physical conduct."

Here again, Judge MacKinnon, writing for the two-judge appeals panel, has inflicted gross chaos and conflict in this vitally important area of federal Civil Service law and administration. The issue—one of overwhelming national importance to the entire federal government and its employees—must be settled by this Court.

CONCLUSION

The petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit must, in justice, be granted.

Respectfully submitted,

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Attorney for Petitioners

CERTIFICATE OF SERVICE

Copies of this petition for writ of certiorari were served by first class mail this 17th day of July, 1978, upon Ronald R. Glanz, Esq., Appellate Division, Department of Justice, Washington, D. C., attorney for Government respondents, and James F. Fitzpatrick, Esq., Arnold & Porter, 1229 19th Street, N. W., Washington, D. C., attorney for intervenor-respondent.

EDWARD L. MERRIGAN

APPENDIX

APPENDIX

Section 203(b)(2) of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2473(b)(2)), as amended (42 U.S.C. 2473(c)(2)), reads as follows:

> "In the performance of its functions the Administration is authorized——
>
> "(2) to appoint and fix the compensation of such officers and employees as may be necessary to carry out such functions. Such officers and employees shall be appointed in accordance with the civil service laws and their compensation fixed in accordance with Chapter 51 and subchapter III of Chapter 53 of Title 5, except (A) to the extent the Administrator deems such action necessary to the discharge of his responsibilities, he may appoint not more than four hundred and twenty-five of the scientific, engineering, and administrative personnel of the Administration without regard to such laws, and may fix the compensation of such personnel not in excess of the highest rate of grade 18 of the General Schedule, and (B) to the extent the Administrator deems such action necessary to recruit specially qualified scientific and engineering talent, he may establish the entrance grade for scientific and engineering personnel without previous service in the Federal Government at a level up to two grades higher than the grade provided for such personnel under the General Schedule, and fix their compensation accordingly, . . ."

Section 203(b)(5) of The National Aeronautics and Space Act of 1958 (42 U.S.C. 2473(b)(5)), as amended (42 U.S.C. 2473(c)(5)), reads as follows:

> "In the performance of its functions the Administration is authorized——
>
> "(5) without regard to section 529 of Title 31, to enter into and perform such contracts, leases, coopera-

tive agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation or educational institution. To the maximum extent practicable and consistent with the accomplishment of the purpose of this Chapter, such contracts, leases, agreements, and other transactions shall be allocated by the Administrator in a manner which will enable small-business concerns to participate equitably and proportionately in the conduct of the work of the Administration, ..."

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1821

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL.

v.

JAMES E. WEBB, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., APPELLANTS

No. 76-1934

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL.

v.

JAMES E. WEBB, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL.

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES, APPELLANT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appeals from the United States District Court
for the District of Columbia

(Civil Action No. 3261-67)

Argued January 21, 1977

Decided March 20, 1978

Judgment entered this date

Gil Zimmerman, Special Attorney, Department of Justice, for appellants in No. 76-1821. *Rex E. Lee*, Assistant Attorney General, and *Irving Jaffe*, Deputy Assistant Attorney General, were on the brief for appellants in No. 76-1821. *Ronald R. Glancz* and *Harry R. Silver*, Attorneys, Department of Justice, also entered appearances for appellants in No. 76-1821.

James F. Fitzpatrick, with whom *Stephen M. Sacks* was on the brief, for appellant in No. 76-1934, also entered appearances for appellee, National Council of Technical Service Industries in No. 76-1821.

Edward L. Merrigan for appellees.

Before MR. JUSTICE CLARK,* *of the Supreme Court of the United States*, and MACKINNON and ROBB, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge*: A reduction-in-force (RIF) was announced at the Marshall Space Flight Center in Huntsville, Alabama (Marshall and MSFC), on December 6, 1967.[1] 764 federal government employees were

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* Mr. Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation pursuant to 28 U.S.C. § 294(a). Mr. Justice Clark heard oral argument in this case but subsequently died and did not participate in the final decision.

[1] The amount of money involved in this case is substantial. In the fall of 1967, immediately prior to the RIF which

originally affected, though this was later reduced to only 166. The RIF procedure [2] requires that employees be laid-off only if they cannot be placed in alternative available positions for which they are qualified at Marshall. NASA utilized the services of both government employees and independent technical service contractors who in turn hired their own employees (contractor employees).[3]

Appellants here are several former individual employees of Marshall, who have been displaced by the RIF, and the union.[4] Their complaint, in its most essential terms, is that NASA was employing many technical service workers at Marshall supposedly as independent contractors, but actually with a degree of control by NASA and with other characteristics that made them functionally employees of the United States. It is alleged that such an arrangement would violate the Civil Service laws,[5] and that if they were actually employees of the United States,

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prompted this litigation, the Marshall Center utilized 8,218 support contractor employees and 7,086 permanent Civil Service employees. There were 12 principal contractors which received from NASA approximately $70 million each year for the support services. J.A. 1209-10. By 1968, it was estimated that the Federal Government had contracted for $8.5 billion of such services. Govt. Br. at 8.

[2] *See* 5 C.F.R. § 351 (1977).

[3] The subjects of the contracts at Marshall ranged from routine maintenance to sophisticated technical laboratory assistance.

[4] The standing of those employees, and of the union, to bring suit has already been considered and upheld on an earlier appeal of this case. Lodge 1858, AFGE v. Paine, 141 U.S.App. D.C. 152, 436 F.2d 882 (1970). See text at 7 *infra*.

[5] 5 U.S.C. § 3502 (1970) specifies the order of retention of "employees" during a RIF. If the contractors' employees were actually employees of the federal government, they would have to be melded into the tenure roster, with the result that fewer of the plaintiffs would be dismissed.

the arrangement would allegedly also violate NASA's own statute,[6] and its collective bargaining agreement. If the contracts with the independent technical services contractors which are here in question, were, for these reasons, illegal, appellants contend that they should then be set aside and that civil service employees, rather than being terminated by the RIF, should be permitted to take over the positions filled under the agreements with the contractors.

I

The case has a long litigational history. The complaint was filed in 1967, and dismissed by the district court on April 24, 1968 for failure to exhaust administrative remedies. We vacated the dismissal and remanded the case on April 21, 1970.[7] On November 30, 1973, the district court granted partial summary judgment in the remanded cause, ruling that if any of the workers employed pursuant to the independent contracts were functionally employees, the plaintiffs would have relief. In an exercise of the discretionary doctrine of primary jurisdiction, the district court held the proceedings in abeyance for 60 days, during which the

> matter [was] . . . referred to the United States Civil Service Commission with directions to apply the "Pellerzi Standards" and determine whether the relationship of "employer-employee" existed on December 6, 1967, and exists at the present time be-

[6] 42 U.S.C. § 2473(b)(2) (1970) provides:

> In the performance of its functions the Administration is authorized . . . to appoint and fix the compensation of such officers and employees as may be necessary to carry out such functions. Such officers and employees shall be appointed in accordance with the civil-service laws . . . .

See text at 5 *infra*.

[7] *Lodge 1858, AFGE, supra* note 4. Exhaustion of administrative remedies had occurred just prior to oral argument.

> tween National Aeronautics and Space Administration and the contractor non-civil service employees involved in this case . . .

(J.A. 409).

The "Pellerzi Standards," referenced in the trial judge's order, figure importantly in this appeal. In October of 1967, General Counsel Pellerzi of the U.S. Civil Service Commission issued an opinion concerning the legality of certain contracts at the Goddard Space Flight Center.[8] That opinion set forth six specific criteria for determining whether the individuals furnished by the independent contractors were employees of the contractors or of the United States.[9] If all six criteria were present, an ar-

[8] J.A. 295.

[9] Accordingly, contracts which, when realistically viewed, contain all the following elements, each to any substantial degree, either in the terms of the contract, or in its performance, constitute the procurement of personal services proscribed by the personnel laws.

—Performance on-site.

—Principal tools and equipment furnished by the Government

—Services are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission

—Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel

—The need for the type of service provided can reasonably be expected to last beyond one year

—The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order:

—To adequately protect the Government's interest or

[Continued]

rangement that had been considered an independent contract should instead, in the Commission's view, be treated as employment.

On December 21, 1973, the district court clarified its order to the Civil Service Commission. At issue was a supplement to the Pellerzi opinion that had been prepared by the successor General Counsel Mondello of the U.S. Civil Service Commission (J.A. 1512). The court instructed that "the Mondello Supplement . . . did not add any new or different standards or cancel or delete any of the 'Pellerzi Standards' but reaffirmed them and supplied the classification thereof" (J.A. 442).

The U.S. Attorney had submitted instructions to the United States Civil Service Commission as to the correct standard to use, but the district court in an order of April 2, 1974 refused to approve those instructions. On May 30, 1974, the Civil Service Commission issued its report on the Marshall contracts.

The Commission's report was thorough and exhaustive.[10] It reached the conclusion that none of the contracts involved in this case were impermissible. The district court, after reviewing the Commission's report, disagreed. Thirty-two contracts are involved in this case; the court held that twenty-two of them were invalid, two more were partially invalid, and eight were permissible (J.A. 434-35). The Administrator of NASA and the intervenor National Council of Technical Service Industries brought this appeal.

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[9] [Continued]

—To retain control of the function involved, or

—To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

(J.A. 352-53).

[10] It is reproduced in the joint appendix at pages 504-1156.

II

Appellants reiterate their objections to plaintiffs' standing, but these matters have already been settled on previous appeal.[11] In brief recapitulation, the plaintiffs here, and their union, would benefit from a voiding of the allegedly impermissible contracts. There would be substantial retroactive benefits and substantial future benefits except in the rare case that NASA immediately abolished all of the jobs the contractors were filling, or immediately provided for legitimate contracts to cover them. These possibilities are not so likely of realization, however, as to make the relief sought by plaintiffs purely speculative within the meaning of *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). Furthermore, the statutes and regulations protecting rights of federal civil service employees constitute a "pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard" within the meaning of *Cort v. Ash*, 422 U.S. 66, 82 (1975). And permitting a private cause of action to prevent abuses of that legislative scheme would not interfere with the statutory purpose or with concerns of federalism. *Cort v. Ash*, 422 U.S. at 78.

III

Accordingly, we turn to the merits of the appeal. The basic question presented is whether the support service contracts in effect at the Marshall Space Flight Center violate the personnel procurement restrictions of the NASA enabling act as set forth in 42 U.S.C. § 2473(b)(2) or whether they fall within the range of the broad contracting authority granted to NASA by 42 U.S.C. § 2437(b)(5).

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[11] *Lodge 1858, AFGE, supra* note 4.

Subsection (b) (2) of the act provides as follows:

> (b) In the performance of its functions the Administration is authorized—
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> * * *
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> (2) *to appoint* and fix the compensation of such officers and *employees* as may be necessary to carry out such functions [listed in subsection (a)]. Such officers and *employees* shall be *appointed in accordance with the civil service laws* and their compensation fixed in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, *except* that (A) to the extent the Administrator deems such action necessary to the discharge of his responsibilities, he may appoint not more than four hundred and twenty-five of the scientific, engineering, and administrative personnel of the Administration without regard to such laws . . .

(Emphasis added). This section states only that *NASA's employees* shall be covered by the civil service and compensation laws, except that 425 NASA *employees* can be appointed without regard to those laws. The exception was intended to enable NASA to recruit qualified scientists, engineers, and other personnel on a prompt basis without regard to civil service limitations.[12]

Subsection (b) (5) specifically concerns support service contracting, which is the focus of appellee's challenge. That section provides:

> In the performance of its functions [under the National Space Program] the Administrator [NASA] is authorized—
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> . . . .
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> (5) without regard to section 529 of Title 31, to enter into and perform such *contracts*, leases, cooperative agreements, or *other transactions* as may be necessary in the conduct of its work and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof, or with *any person, firm, association, corporation*, or educational institution. To the maximum extent practicable and consistent with the accomplishment of the purpose of this chapter, such contracts, leases, agreements, and other transactions shall be allocated by the Administrator in a manner which will enable small-business concerns to participate equitably and proportionately in the conduct of the work of the Administration. . . .

42 U.S.C. § 2473(b) (5) (emphasis added). This section embodied the American response to the shattering effect that the Soviet's Sputnik had on our international stature in the post-World War II era. Congress reported that there was a need to catch and overtake the Soviets by having NASA command the resources of the nation in a super effort to accelerate our space effort; the specter of Soviet superiority in an area with strong security overtones was unacceptable.[13] The section epitomizes the Congressional intent to grant NASA the necessary authority and discretion to mount the gargantuan effort. In explaining its intent with respect to this broad grant of power, the House Report stated:

> Paragraph (5) gives the Administrator *broad authority* to enter into and perform *contracts*, leases, agreements, and other transactions, *on such terms* and for such periods *as he deems appropriate* with *any* public or private *agency, firm*, educational institution, or other *person*. [emphasis added.] [14]

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[12] H.R. Rep. No. 1170, 85th Cong., 2d Sess., 1958 U.S. CODE CONG. & AD. NEWS 3178.

[13] *Id.*, at 3160, 3161-64; 42 U.S.C. § 2451(b).

[14] *Id.*, at 3178. Another indication of how broad Congress meant NASA's contract authority under subsection (b) (5)

Indeed, Congress expected that NASA would invoke the participation of private industry and of educational institutions in embarking on the nation's space effort. On June 2, 1958, during House consideration of the act, Speaker McCormack, Chairman of the House Select Committee on Astronautics and Space Exploration, emphasized that NASA's growth would occur principally through contracts with industry and not through the addition to civil service personnel:

> According to NA[S]A witnesses, *the contemplated expansion of functions under the new agency will take place largely by means of contract work rather than through research conducted by the agency itself.* At present, the NA[S]A employs approximately 8,000 people. The NA[S]A witnesses estimated that the increase in agency personnel would not be more than several hundred. Even with considerable allowance for error in their estimate, *it seems likely that the number of new Federal employees in the near future will be relatively small.* In other words, the full benefit of this expending [*sic*] program *will accrue to private enterprise.*"

104 Cong. Rec. 9918 (1958) (emphasis added). These remarks had obvious reference to the practices authorized by Subsection (b) (5) and it is the execution of the very policies referred to in Speaker McCormack's speech that Lodge 1858 claims violates the statute.

At the same time that Congress enacted the enabling act which compelled NASA to produce a mammoth space

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to be is discussed by the following statement in the House Report:

> [T]he authority to make grants without limitation, conferred in the previous bill, has been eliminated as unnecessary in view of [the Administrator's] broad contract and lease authority . . . .

Id., at 3169.

effort, "the number of civil service personnel that could be hired was limited due to personnel ceilings imposed within the Federal Civil Service." Thus, it is not surprising that "support service contracts [were] a way of life at Marshall Space Flight Center from its beginning [in 1960]." [15]

Because of this background, the personnel ceilings on civil service employees, the urgency for the program as expressed by Congress, and the broad contracting authority given to the Administrator, including the direction to favor small business, "NASA and MSFC officials apparently believed they had a mandate in the law to develop a Government/Industry/Education Space team." [16] The result was that NASA and Marshall resorted to support service contracts as the alternative means of overcoming the civil service personnel ceilings.[17] This practice was regularly disclosed to Congress in its budget requests [18] and the resulting appropriations based thereon are an indication of congressional approval.[19] If anything more were needed to approve the practice of using extensive support service contracts, it came in 1971 and 1972 when Congress directed reductions in NASA's *civil service* work force at the same time that it continued to

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[15] Summary Report, U.S. Civil Service Commission, May, 1974, J.A. 510.

[16] *Id.*, at J.A. 510.

[17] *Id.*

[18] In 1970 and 1971, Congress approved budgets for NASA based on the long-standing NASA interpretation of the Space Act. Hearings before the Subcommittee on Manned Space Flight on H.R. 4046 and H.R. 10251 (Fiscal Year 1970 Authorization Act), House Committee on Space and Astronautics, 91st Cong., 1st Sess. 502 (1969).

[19] Kay v. Federal Communications Commission, 143 U.S. App.D.C. 223, 231-32, 443 F.2d 638, 646-47, and cases cited n.32 (1970).

approve its budget requests for funds to meet its obligations under its support service contracts that were in existence.[20]

Appellee contends that "NASA was to perform all its statutory functions under the 1958 Act with [quoting subsection (b) (2)] *'employees appointed in accordance with the civil service laws.'*" According to appellee, the only exceptions to this rule are the 425 employees described in the statute itself (Br. at 37-38). This argument completely disregards the significance of subsection (b) (5) which follows and bears directly upon support service contracting. As already discussed, the employees of these contractors are not *appointed employees* within the meaning of subsection (b) (2). Subsection (b) (5) is

[20] Employment trends and Congressional fiscal authorizations after the Marshall RIF show that Congress mandated additional reduction in civil service employees at NASA, without imposing similar reductions and restrictions on support service contracts. Civil service employment at NASA in the years 1970, 1971, and 1972 was 32,548, 30,506, and 28,382 employees respectively. United States Department of Commerce, Bureau of the Census, STATISTICAL ABSTRACT of the UNITED STATES, No. 389, at 236 (1974). At the same time, Congress *increased* fiscal authorizations for support service contracting. Support service contracts were authorized to be paid under the "research and program management" appropriation by the authorization acts. *E.g.*, NASA Authorization Act of 1971, Pub. L. No. 91-303, § 1(e), 84 Stat. 368 (1970). The 1971 Act appropriated $683 million for research and program management, of which $506 million was available for personnel and related costs (NASA Authorization Act of 1971, Pub. L. No. 91-303, § 1(c), 84 Stat. 368 (1970)); the 1972 Act appropriated $693 million for research and program management, of which $530 million was available for personnel and related costs (NASA Authorization Act of 1972, Pub. L. No. 92-68, § 1(c), 85 Stat. 174 (1971); and the 1973 Act appropriated $729 million for research and program management, of which $572 million was available for personnel and related costs (NASA Authorization Act of 1973, Pub. L. No. 92-304, § 1(c), 86 Stat. 157 (1972).

more than an exception to subsection (b) (2); it covers a different situation altogether. Appellee cites numerous passages for legislative history all stating that NASA employees shall be appointed in accordance with the civil service laws. Appellee's use of these passages does not account for the difference between employees of contractors under subsection (b) (5) and employees of the United States appointed under subsection (b) (2).

Appellee further argues that subsection (b) (5) is not a license to evade and circumvent subsection (b) (2) (Br. at 44). This begs the question: unless NASA treats the employees of the contractors as subsection (b) (2) appointed employees, subsection (b) (5) is not being used to circumvent subsection (b) (2). Nothing in 31 U.S.C. §§ 665(a), 665(b) is to the contrary: those sections provide that no officer or employee of the United States shall employ personal service or involve the Government in contracts or other obligations beyond the authority of law. Subsection (b) (5) authorizes support services contracts, and Title 31 is not violated so long as the contractor's employees are not treated as employees within the meaning of the civil service laws. In this regard, appellee states:

> No federal agency, including NASA, may award its regular work functions to non-Civil Service employees, through the use of corporate intermediaries, contracts or any other device, without first obtaining specific statutory authority from Congress to exclude such work from the federal classified Civil Service.

Br. at 53 (emphasis omitted). This statement goes much too far. Congress gave NASA a specific, giant task in need of quick fulfillment and broad power to enter into *contracts* as necessary for the performance of its work on such terms as the Administrator thought appropriate. This was specific statutory authority. It is true that

NASA cannot treat the employees as its own; otherwise, the employees would be required to be appointed under subsection (b) (2). This brings us to the question whether the contractor's employees were responsible to the contractor or NASA under the standards we find relevant to that determination. Appellee's argument here sheds little light on the basic issue.[21]

Appellee also argues that "regular civilian work functions" cannot be the subject of support services contracts under subsection (b) (5). Yet appellee does not challenge the district court's decision that eight of the contracts covering, *inter alia*, security, fire protection, medical services, food services, custodial services, and logistic support were *valid subjects of support arrangements*. J.A. 495, 497. This not only belies appellee's argument but also demonstrates that the crucial question in this case is not merely what functions the contractors performed but is whether NASA treated the other questioned contractor's employees as its own employees.

That NASA was authorized to enter into support service contracts by the Act is beyond serious dispute. Subsection (b) (5) gave NASA broad power to contract

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[21] In the same vein, appellee makes this statement in its brief:

> Before leaving this point, the Court might be interested in why Congress has always gone to such lengths to make it clear that, *absent a specific statutory exception*, all work in the Executive Branch must be performed by the Civil Service.

Br. at 55 (emphasis original). Appellee's premise underlying this statement—that contractors under subsection (b) (5) cannot do work in the Executive Branch—would effectively read subsection (b) (5) out of the act. Our concern is not the Executive Branch generally but NASA specifically and that necessarily involves any specific authority conferred on NASA that is not conferred generally on the Executive Branch.

for support services. The narrower question is whether the contracts validly entered into under subsection (b) (5) were improperly administered so as to treat the contractor's employees as subsection (b) (2) employees which were required to be appointed in accordance with the civil service laws.

The statute most basic to this narrower question is 5 U.S.C. § 2105(a) (1970), which relates to the Civil Service, and defines "employee" restrictively as follows:

> For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is—
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> (1) appointed in the civil service by one of the following acting in an official capacity—
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> (A) the President;
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> (B) a Member or Members of Congress, or the Congress;
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> (C) a member of a uniformed service;
>
> (D) an individual who is an employee under this section;
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> (E) the head of a government controlled corporation; or
>
> (F) the adjutants general . . .
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; *and*
>
> (3) subject to the *supervision* of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

(Emphasis added.) All three of the statute's subsections must be satisfied for an individual to be deemed an "employee" within the meaning of the Civil Service laws.

It is critical to observe that of the six Pellerzi criteria,[22] only one overlaps with the statute for determining whether a person is an "employee" of the United States, and that is the necessity for *supervision* (Pellerzi criterion 6; statute provision 3). "Supervision" is a criterion that in importance far exceeds the others. As used in this context, supervision means control of the individual workman's physical conduct, *Kelley v. Southern Pacific Co.*, 419 U.S. 324 (1974), not just oversight; "control [of] the individual in the *performance* of his work and [of] the *manner* in which the work is done . . . is *usually decisive.*" Pellerzi Opinion (J.A. 447) (emphasis added). Employees are distinguished from independent contractors most basically by the detail with which the party for whom the work is eventually produced actually supervises the manner and means by which the work is performed; and *degree of control* or *supervision* is the principal element that differentiates employees and independent contractors at common law,[23] in

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[22] *See* note 9 *supra.*

[23] Restatement (Second) of Agency § 2 (1957) states:

(2) A servant [more recently termed "employee"] is an agent employed by a master to perform service in his affairs whose *physical conduct in the performance of the service is controlled* or is subject to the right to control by the master.

(3) An independent contractor is a person who contracts to work with another to do something for him *but who is not controlled* by the other nor subject to the other's right to control *with respect to his physical conduct in the performance of the undertaking.* (Emphasis added).

Section 220(2) states:

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

[Continued]

the state statutory context,[24] and in the context of other

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[23] [Continued]

(a) the extent of control which, by the agreement, the master may exercise over the *details* of the work . . . . (Emphasis added).

[24] For example, state unemployment compensation acts define "employee" so as to exclude those persons in an independent contractor relationship with the hiring party. *See, e.g.,* Va. Code § 60.1-14(6) (Supp. 1976):

Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless:

(a) Such individual has been and will continue to be *free from control or direction over the performance of such services,* both under his contract of service and in fact; *and*

(b) Such service is either outside the usual course of the business for which such service is performed, or such service is performed outside of all the places of business of the enterprise for which such service is performed; or such individual, in the performance of such service, is engaged in an independently established trade, occupation, profession or business.

(Emphasis added.)

Md. Ann. Code art. 95A, § 20(g)(6)(i)-(iii) (Supp. 1976):

Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this article, irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the Executive Director that:

(i) That individual has been and will continue to be *free from control or direction over the performance of those services,* both under his contract of service and in fact; *and*

(ii) The service is either outside the usual course of business for which that service is performed, or that the service is performed outside of all the

federal statutes as well.[25] All this is another way of saying that the practice of giving an order for a specific service or article, with the right to reject the finished product or result, is not the type of supervision or control

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places of business of the enterprise for which the service is performed; *and*

(iii) The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service in question . . . .

(Emphasis added). Degree of control and direction are crucial factors for differentiating employees and independent contractors in these state statutory schemes. Under these tests the individual workers were employees of the independent service contractors.

[25] The Labor Management Relations Act of 1947 defines "employees," specifying that the term is not to include "any individual having the status of an independent contractor." 29 U.S.C. § 152(3) (1970). The "obvious purpose" of the 1947 amendment to the Wagner Act which explicitly excluded independent contractors from the definition of employee "was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." NLRB v. United Insurance Co., 390 U.S. 254, 256 (1968). *See also* Brown v. NLRB, 462 F.2d 699 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972); NLRB v. Lindsay Newspapers, Inc., 315 F.2d 709 (5th Cir. 1963). The emphasis placed by general agency principles on the degree and nature of supervision has been noted in note 23, *supra*.

Circuit Courts of Appeals, in construing the labor act, have laid stress on the degree of supervision being exercised. *See, e.g.*, Carnation Co. v. NLRB, 429 F.2d 1130, 1134 (9th Cir. 1970) (despite provisions for economic sanctions, the fact that "there is no attempt to supervise the details of the work" bars employee status); NLRB v. A.S. Abell Co., 327 F.2d 1, 3 (4th Cir. 1964): "[A]nalysis of the degree of control exercised by the publishers over the manner and means of performance by the carriers furnished the basic means of discerning whether the carriers are independent contractors or employees."

that converts an individual who is otherwise an independent contractor (such as an employee of a contractor) into an employee.

The situation here involves NASA entering into written contracts with various companies to perform special services. In each contract, NASA looked to the company that hired the individuals to perform certain tasks. However, the individual companies, not NASA, were to furnish the necessary management and personnel. It was the responsibility of each company to supervise, control, and direct the performance of its own employees in fulfilling the contract's requirements. These contracts required the companies to exercise their independent judgment. This is the classic independent contractor relationship.

In actual operation, in those instances which come closest to the employee borderline, NASA generally gave specific orders, usually to the company supervisor, for certain articles and services. "[T]he *contractor* [not his employees] were told what to do, when to do it, how it was to be done, the qualification requirements for his key people, how and when to report on his activities, etc." (J.A. 454). But the control over the performance of such requests and the responsibility for the manner in which they would be carried out was in the contracting party and its supervisors. Thus, the specificity of the requests did not transcend the fact that the actual on-the-spot supervision employed to produce compliance was carried out by the contracting company and its employees. The situation was thus very similar to that in *Chicago R.I. & P.R. Co. v. Bond*, 240 U.S. 449, 456 (1916) where the contractual arrangement was "not the engagement of a servant submitting to subordination and subject momentarily to superintendence, but of one capable of independent judgment, to be judged by its results." This was particularly apparent in a great many of the contracts here because a substantial portion of the contractually

acquired services which are in question involved scientific, engineering, technical, and other highly skilled or professional personnel who were fully capable of exercising independent judgment in performing their services and were expected to do so. And, by way of contrast, some of the contracts for the more menial services, where substantial independent judgment was not an ordinary factor, and control and supervision could be more easily found in a mere order, the district court agreed with the Civil Service Commission that supervision was nonexistent in the sense intended by the employee standards.[26]

Without supervision by NASA, the employees of the contractors for the supporting services cannot be viewed as employees for subsection (b) (2) purposes who must be appointed in accordance with the civil service laws. In this case, it cannot be said that the Civil Service Commission's decision was in error when on the basis of the facts it found it based its conclusion concerning employee-independent contractor status on the *degree of supervision* exercised over the work performed.

The district court did criticize the Commission's insistence that all six of the "*Pellerzi*" standards be met (J.A. 449). Appellee's argument that the contractor's employees are subsection (b) (2) employees, to the extent it is based on application of the Pellerzi standards, has a

[26] This finding referred to the plant operation support services at Michond Assembly Facility under Contracts Nos. NAS 8-14017, 8-26887. Such services included: custodial, plant engineering and maintenance, transportation, supplies, food, security and fire protection. Also, of a non-menial character; photographic, medical, telecommunications and documentation (J.A. 494-96). A similar result was reached with respect to the Global Associates Contract No. NAS 8-26896 for facility operating services (J.A. 489, 492-94) and concerning Contracts Nos. NAS 8-14110 and 8-21808 insofar as they contracted for custodial, refuse collection, laundry, and photo repair (J.A. 481-88).

facial validity, but it loses its vitality when the activities of the individuals in question are weighed against the all-important sixth standard concerning supervision. For example, had the Commission found that these individuals were not in an employer-employee relationship with NASA even where very close supervision was imposed, because, perhaps, one or several of the other Pellerzi standards was not met, its decision might have been subject to more criticism. In this case, however, the Commission's insistence that all six Pellerzi standards be met was functionally equivalent to a requirement that only the decisive "supervision" standard be met, since *there was no contract among the 32 reviewed where the sixth factor—NASA supervision—was present.* It would have been improper for the district court to have rejected the Commission's conclusions simply because it insisted that all six Pellerzi elements coexist. But unless special significance were accorded the critical sixth factor, such an approach would have been equivalent to holding that employee status could be found even in the absence of supervision by the alleged employer. We would disagree generally with such conclusion.

Since we do not disagree with the district court's conclusion that all six Pellerzi elements need not be present, we turn to the all-important matter of how the district court construed the supervision requirement. The court supplanted the Sixth Standard with a test that "requires only a showing that 'the inherent nature of the service, or the manner in which it is provided, reasonably requires, directly or indirectly, federal direction or supervision of contractor employees.' " [27] This tracks some of the language in the Pellerzi opinion but fails to reach an important feature added by the Mondello Supplement which calls attention to the requirement of "supervision . . . by Government employees" (J.A. 1514). The Mon-

[27] J.A. 449.

dello Supplement recognized that the "touchstone of legality under the personnel laws is whether the contract creates what is tantamount to an employer-employee relationship between the Government and the employee of the contractor" (J.A. 1512). The Supplement recognized that the *basic criteria* by which this relationship is judged are set forth in 5 U.S.C. § 2105(a), and stated further:

> The six elements . . . relate principally to the third statutory criterion concerning supervision of a contractor employee by a Federal officer or employee. *If the contract terms permit such supervision, or if in the actual performance of the contract such supervision is conducted, the test is met.*

J.A. 1513 (emphasis added). The standard used by the district court is an incomplete expression of the proper standard by which contracts for services as various as those here involved should be tested. Moreover, that standard focuses incorrectly on what the nature of the questioned service "reasonably requires" and ignores the always critical factor of who actually exercises the supervision over the manner and "performance of the duties of [the] position." [28]

Additional defects in the standard need not be mentioned because we view the decision in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), as strongly persuasive if not completely controlling on the facts here present. Kelley was an employee of Pacific Motor Trucking Company (PMT), a subsidiary wholly owned by the Southern Pacific Company that operates the Southern Pacific Railroad. The two companies had a contractual relationship covering PMT's trucking operations which were operated primarily in conjunction with the railroad operations of its parent company. In accordance with its contract with the railroad, PMT would unload automobiles that

[28] 5 U.S.C. § 2105(a).

had been transported over the rail lines of the Southern Pacific. In the process of such unloading operations, Southern Pacific employees in the area would occasionally consult with PMT employees about the unloading process, but PMT supervisors controlled and directed the actual day-to-day operations.

One day, Kelley was injured in the process of unloading automobiles. Claiming that his injuries were caused by the negligence of the Southern Pacific Railroad, Kelley sued under the Federal Employees' Liability Act (FELA) on the alleged ground that he was covered thereby as an employee of the railroad.

The trial court found that Kelley in his work was within the coverage of the FELA. In support of its judgment it asserted that unloading the automobiles was the "railroad's responsibility," that the railroad supplied the unloading ramps and owned the area where PMT employers worked, that the "responsibility for supervision and control of the unloading operation was [the railroad's]," and that in effect "PMT employees were agents of the railroad . . . in fulfillment of a non-delegable duty of defendant Southern Pacific Company." 419 U.S. at 423. The Court of Appeals reversed and the Supreme Court granted certiorari.

In an opinion by Justice Marshall, the Supreme Court decided that the trial court applied an erroneous legal standard when it held that Kelley was covered by the Federal Employers' Liability Act because of the "traditional agency relationship" between the railroad and PMT. In its place, the court held that the proper standard required proof of a "master-servant relationship . . . determined by reference to common-law principles." It pointed approvingly to section 220(1) of the Restatement (Second) of Agency that defines a servant as "a person employed to perform services in the affairs of another and who with respect to the *physical conduct*

in the performance of the services is subject to the other's control or right to control." 419 U.S. at 425 (emphasis added).

The opinion ruled that Kelley was not (1) a borrowed servant, or (2) employed by two masters simultaneously, and eventually rejected the third possibility that he was (3) a subservant of a company that was in turn a servant of the railroad. While PMT was clearly an agent of the railroad, the opinion stated that a "finding of agency is not tantamount to a finding of a master-servant relationship" and that the "test" applied by the district court was "too broad." A similar characterization seems appropriate for the test used by the district court here. Actually the relationship in this case between the Government and the numerous contractors is not as close as the relationship which existed between Pacific Motor and the parent railroad company. The contracts here were arms-length transactions and not all of the services were rendered on government property. But it is in the nature of the supervision of the contractor's employees that the two cases are most alike: in both cases, the "day-to-day" supervision of the "physical conduct" on "the details of the job performed by the individual [employees of the contractor]" was in the independent contractor—and the decision of the Supreme Court with respect to this vital element is completely destructive of the standard used and decision reached here by the district court. Like *Kelley*, we find that the standard used here by the trial court was "too broad." *United States v. Orleans*, 425 U.S. 807 (1976), also supports this conclusion.

IV

The district court found a second error in the Commission's test of employee status. The Civil Service Commission made its decision "in accordance with the instructions given by the Office of the U.S. Attorney" (J.A. 515). Those instructions included the following admonition: "with regard to the sixth element, relatively *continuous*, close supervision of a substantial number of contractor employees must be present and must be shown to be related to one of the following requirements, '(a) to adequately protect the government's interest, or (b) to retain control of the function involved, or (c) to retain full personal responsibility for the function supported in a duly authorized Federal officer or employee'" (J.A. 515; emphasis added).

The final three specifications of this order are taken verbatim from the Pellerzi Standards. The controversy does not concern them. Rather, the district court found no support in the Pellerzi or Mondello opinions for the word "continuous" modifying "supervision" (J.A. 450-51). The Pellerzi opinion indicated employee status when, all else being present, "[t]he inherent nature of the service . . . reasonably requires directly or indirectly, government direction or supervision of contractor employees . . ." (J.A. 352). The Mondello Supplement interpreted the sixth Pellerzi factor to mean "a requirement for close supervision of contractor employees by Government employees" (J.A. 1514). To construe the phrases "reasonably requires . . . supervision" and "a requirement for close supervision" to mean "relatively continuous, close supervision" (emphasis added), is a very natural and proper interpretation. "Close" supervision, standing alone, evokes the implication of *continuity* of supervision. And the modifier "relatively" makes the Commission's standard unassailable. The validity of the statement is further buttressed by its placement in juxtaposition to the assertion that "sporadic supervision of an individual . . . may be ignored" (J.A. 442; emphasis added).

V

The district court was not required to send this matter to the Civil Service Commission, but it chose to do so

in an exercise of its discretion. "Under the doctrine of primary jurisdiction, a court may entertain an action for permanent relief and defer its consideration of the merits until an agency 'with special competence' in the field has ruled on the issues. . . . This doctrine has application to the [agency] . . . *even assuming that its function is advisory* since it has the special competence and experience that is the life and reason of the primary jurisdiction rule." *Wheelabrator Corp. v. Chafee*, 147 U.S.App.D.C. 238, 248, 455 F.2d 1306, 1316 (1971) (emphasis added). "Whether the agency happens to be expert or not, a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer . . . ." K. DAVIS, 3 ADMINISTRATIVE LAW TREATISE (1958) § 19.01 at 5 (discussing primary jurisdiction). In *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), the labor board's decision on a statutory question admittedly did not come about because of any discretionary exercise of primary jurisdiction. Nevertheless, the Court's justification for deferring to the Board, even on a matter purely of law, is instructive here:

> Everyday experience in the administration of the statute gives [the Board] familiarity with the circumstances and backgrounds of employment relationships . . . . The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question . . . "belongs to the usual administrative routine" of the Board. . . .
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> . . . [T]he Board's determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.

322 U.S. at 130-31. Here, it is the Civil Service Commission that possesses the expertise. The district court's action in sending the case to the Civil Service Commission

rather than an exercise of primary jurisdiction could alternatively be analogized to the appointment of a special master. The time limit given to the Commission for response supports that interpretation of the court's action. If the procedure followed was that of appointing a master, however, the district court's review is every bit as limited as under the primary jurisdiction theory, for Federal Rule of Civil Procedure 53(e)(2) provides: "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."

Here, the Civil Service Commission, as noted above, found an absence of supervision in all 32 contracts in dispute. There is substantial support in the record for the Commission's conclusions. While the fact that it believed all six Pellerzi standards had to be met in order for an employer-employee relationship to exist was incorrect, this error did not affect the weight of the Commission's decision on the critical sixth Pellerzi standard on supervision. Under the circumstances of this case, it was error for the court to reject the conclusions of the Commission on the application of the sixth standard to these contracts.

VI

In addition to the foregoing, there are additional grounds for holding that subsection (b)(2) is not controlling here insofar as the contractors' employees are concerned. As this opinion has already stated, the contractors' employees have not been shown by appellee to be employees of the United States who must be appointed in accordance with subsection (b)(2) and concomitantly as civil service employees under the civil service laws. This is because subsection (b)(5) validly authorized NASA to enter into separate contracts under which certain services contracted for were performed by employees of the contractor, and in the performance of such con-

tracts NASA did not treat the contractors' employees in such a manner that they became employees of NASA or the United States.

In urging that we adopt a contrary conclusion—particularly in urging us to conclude that contractors' employees cannot be used to perform the agency's work functions in the manner and for the purposes here disclosed—appellee effectively reads subsection (b)(5) as though it were contradicted and controlled by subsection (b)(2). Appellee argues that "[t]here is nothing in Section 203(b)(5) of the NASA statute . . . which *repeals* Section 203(b)(2) or which authorizes NASA to evade and circumvent Section 203(b)(2) . . ." (Appellee Supp. Br. at 4; emphasis added). This contention is falsely premised on the reasoning that subsection (b)(5) must repeal subsection (b)(2) in order to validate the support service contracts, but such argument fails to give subsection (b)(5) its proper due. It fails to recognize the potential that Congress intended for subsection (b)(5) to assist in the performance of NASA's work. Subsection (b)(5) need not "repeal" subsection (b)(2) in order to achieve its separate status. To the extent that it provides for a *specific* manner in which NASA may carry out some of its work, it is a specific exemption from the general provisions of subsection (b)(2) and must be recognized as such.

The long established rule of statutory construction "gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern, even if the general provision was enacted later." *Simpson v. United States*, 46 U.S.L.W. 4159, 4162 (1978).[29] Here, subsection (b)(2) is gen-

[29] However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208.

MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944).

Courts have relied on this principle on many occasions. *E.g.*, Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228-29 (1957); Missouri v. Ross, 299 U.S. 72, 76 (1936); Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932); Kepner v. United States, 195 U.S. 100, 125 (1904); United States v. Chase, 135 U.S. 255, 260 (1890); United States v. Jones, 131 U.S. 1, 19 (1889); International Longshoremen's and Warehousemen's Union v. Wirtz, 170 F.2d 183, 187 (9th Cir. 1948); *cert. denied*, 336 U.S. 919 (1949); Detrich v. Howard, 155 F.2d 307, 309 (7th Cir. 1946); La Page v. United States, 146 F.2d 536, 538 (8th Cir. 1945); United States v. City of Chester, 144 F.2d 415, 421 (3d Cir. 1944); Callahan v. United States, 74 U.S.App.D.C. 281, 282, 122 F.2d 216, 217 (1941). 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION, §§ 47.16, 47.17, at 101-09 (4th ed. 1973).

eral: it is a general authorization for the Administrator to appoint and fix the compensation of such officers and employees under the Civil Service laws to perform NASA's functions to the extent that it may consider desirable, subject to certain personnel limits and with certain leeway in some salaries. Subsection (b)(5), however, is more specific: it is in addition to (b)(2) and it authorizes the Administrator to enter into "contracts . . . or other transactions *as may be necessary* in the conduct of [NASA's] work and on *such terms as it may deem appropriate*" (emphasis added). Thus, as Speaker McCormack clearly stated,[30] Congress intended NASA to perform its assigned functions under *both* subsections and in this respect the statute confers a broad discretion upon NASA to use subsection (b)(5) to the extent that it considers "may be necessary in the conduct of [its] work . . . ."

The force of subsection (b)(5) as specifying a separate means, *independent* of subsection (b)(2), for per-

[30] *See* text at 10 *supra*.

forming NASA's functions is further strengthened by its location in the statute after subsection (b)(2). The established rule is that if there exists a conflict in the provisions of the same act, the last provision in point of arrangement must control.[31] Thus, while subsection (b)(5)

[31] *E.g.*, Buttfield v. Stranahan, 192 U.S. 470, 494-96 (1904); Inter-Continental Promotions, Inc. v. MacDonald, 367 F.2d 293, 301 (5th Cir. 1966), *cert. denied*, 393 U.S. 834 (1968); Hudson Motor Car Co. v. Hertz, 121 F.2d 326, 330 (6th Cir.), *cert. denied*, 314 U.S. 696 (1941); United States v. Updike, 25 F.2d 746, 752 (D.C. Neb. 1928), *aff'd*, 32 F.2d 1 (8th Cir. 1929), *aff'd*, 281 U.S. 489 (1930); United States v. Daniels, 279 F. 844, 849 (2d Cir. 1922); Great Northern R. Co. v. United States, 155 F. 945, 959 (8th Cir. 1907), *aff'd*, 208 U.S. 452 (1908); United States v. Jackson, 143 F. 783, 787 (9th Cir. 1906); In re Richards, 96 F. 935, 939 (7th Cir. 1899); Skeeles v. United States, 118 Ct. Cl. 362, 367, 95 F. Supp. 242, 247, *cert. denied*, 341 U.S. 948 (1951); In re Jacobs, 7 F. Supp. 749, 752 (N.D. Ill.), *appeal dismissed*, 73 F.2d 1002 (7th Cir. 1934); Alabama State Bd. of Health v. Chambers Cty., 335 So. 2d 653, 655 (Ala. 1976); CableVision, Inc. v. Freeman, 324 So. 2d 149, 152-53 (Fla. App. 1975), *appeal dismissed*, 336 So. 2d 1180 (Fla. 1976), *appeal dismissed*, 429 U.S. 1032 (1977); In re Ashworth, 291 Ala. 723, 728, 287 So. 2d 843, 847 (1974); Bible & Godwin Constr. Co. v. Faener Corp., 504 S.W.2d 370, 372 (Tenn. 1974); State v. Crenshaw, 287 Ala. 139, 142, 249 So. 2d 622, 624 (1971); Wilkins v. Woolf, 281 Ala. 693, 701, 208 So. 2d 74, 80 (1968); State v. Boca Raton, 172 So. 2d 230, 233 (Fla. 1965); Schneider v. Forcier, 67 Wash. 2d 161, 164, 406 P.2d 935, 937 (1965); Fink v. Cold Spring Granite Co., 262 Minn. 393, 398, 115 N.W.2d 22, 26 (1962); Stoller v. State, 171 Neb. 93, 98, 105 N.W.2d 852, 856-57 (1960); State v. Hialeah, 109 So. 2d 368, 370 (Fla. 1959); Town of Homecroft v. Macbeth, 238 Ind. 57, 63, 148 N.E.2d 563, 567 (1958); Gilbertson v. Culinary Alliance & Bartenders' Union, 204 Ore. 326, 336, 282 P.2d 632, 638 (1955); City of Petaluma v. Pacific Tel. & Tel. Co., 44 Cal. 2d 284, 289, 282 P.2d 43, 46 (1955); Application of Oklahoma Turnpike Authority, 206 Okla. 617, 624, 246 P.2d 327, 331 (1952); Ogle v. Tennessee Eastman Corp., 185 Tenn. 527, 529, 206 S.W.2d 909, 910 (1947); Hartford Acci. & Indem. Co. v. City of Tulare, 30 Cal. 2d 832, 836, 186 P.2d 121, 123 (1947); Johnson v. State, 157 Fla. 685, 693, 27 So. 2d 276, 282 (1946); *cert.*

does not repeal subsection (b)(2), and only conflicts with it to the extent that it provides for additional authority, it is clear that subsection (b)(5) does provide a separate, alternative, independent means of per-

denied, 329 U.S. 799 (1947); Woodroof v. City of Nashville, 183 Tenn. 483, 486, 192 S.W.2d 1013, 1015 (1946); Tyler v. Huiet, 199 Ga. 845, 849, 36 S.E.2d 358, 361 (1945); People v. Moroney, 24 Cal. 2d 638, 642, 150 P.2d 888, 891 (1944); Feldman v. South Carolina Tax Comm., 203 S.C. 49, 52, 26 S.E.2d 22, 24 (1943); Jacoby v. Missouri Valley Drainage Dist., 349 Mo. 818, 830, 163 S.W.2d 930, 938 (1942); Commonwealth v. Chester Cty. Light & Power Co., 339 Pa. 97, 100, 14 A.2d 314, 316 (1940); Ebbert v. Tucker, 123 W.Va. 385, 392, 15 S.E.2d 583, 587 (1941); Darby v. De Loach, 190 Ga. 499, 501 9 S.E.2d 626, 627 (1940); Hudson v. State Compensation Commr., 121 W.Va. 461, 465, 5 S.E.2d 108, 111 (1939); Sealed Power Corp. v. Stokes, 174 Tenn. 493, 498, 127 S.W.2d 114, 117 (1939); Markel v. Glassmeyer, 137 Neb. 243, 246, 288 N.W. 821, 823 (1939); Enyeart v. City of Lincoln, 136 Neb. 146, 150, 285 N.W. 314, 317 (1939); Gentry v. Blinn, 184 Okla. 9, 12, 84 P.2d 27, 29 (1938); Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 626, 283 N.W. 366, 370 (1938); Burton v. Denver, 99 Colo. 207, 211, 61 P.2d 856, 858 (1936); Southern R. Co. v. Grigsby, 155 Tenn. 285, 288, 292 S.W. 3, 5 (1927); Coker v. Wilkinson, 142 Miss. 1, 2, 106 So. 886, 887 (1926); State v. Tullock, 72 Mont. 482, 484, 234 P. 277, 278 (1925); State v. Burchfield Bros., 211 Ala. 30, 32, 99 So. 198, 200-01 (1924); Board of Drainage Commrs. v. Carey, 30 Ga. App. 378, 378, 118 S.E. 445, 445 (1923); Richardson v. Browning, 61 Cal. App. 110, 113, 214 P. 281, 283 (1923); State v. Industrial Comm. of Ohio, 105 Ohio St. 103, 106, 136 N.E. 896, 898 (1922); State v. Public Service Comm., 101 Wash. 601, 606, 172 P. 890, 893 (1918); Davis v. State, 16 Ala. App. 397, 399, 78 So. 313, 314 (1918); State v. Gideon, 273 Mo. 79, 81, 199 S.W. 948, 949 (1917); Board of Park Commrs. v. City of Nashville, 134 Tenn. 612, 620, 185 S.W. 694, 699 (1916); Board of Education v. Tyler County Court, 77 W.Va. 523, 527, 87 S.E. 870, 872 (1915); Cox v. Timm, 182 Ind. 7, 12, 105 N.E. 479, 482 (1914); Woodring v. McCaslin, 182 Ind. 134, 137, 104 N.E. 759, 761 (1914); Curless v. Watson, 54 Ind. App. 110, 118, 100 N.E. 576, 580 (1913); State v. St. Louis, 241 Mo. 231, 241, 145 S.W. 801, 807 (1912); Gish v. Shaver, 140 Ky. 647,

forming NASA's statutory duties which Congress contemplated would be exercised contemporaneously with the authority conferred by subsection (b) (2) in conformance with NASA's discretion and to the extent permitted by funds available from the yearly appropriations of Congress.

Finally, the relative utilization of civil service employees and employees of support service contractors at NASA in the years surrounding the reduction-in-force

649, 131 S.W. 515, 516-17 (1910); Ex parte Smith, 33 Nev. 466, 474, 111 P. 930, 935 (1910); Shutt v. State, 173 Ind. 689, 691, 89 N.E. 6, 7 (1909); Peterson v. People, 129 Ill. App. 55, 57 (1906); Harvey Coal & Coke Co. v. Dillon, 59 W.Va. 605, 625, 53 S.E. 928, 940 (1905); Joseph Speidel Grocery Co. v. Warder, 56 W.Va. 602, 605, 49 S.E. 534, 536 (1904); Hand v. Stapleton, 135 Ala. 156, 158, 33 So. 689, 690 (1902); Omaha Real Estate & Trust Co. v. Reiter, 47 Neb. 592, 599, 66 N.W. 658, 663 (1896); Ex parte Hewlett, 22 Nev. 333, 335, 40 P. 96, 97-98 (1895); Howard v. Bangor & A. R. Co., 86 Me. 387, 388, 29 A. 1101, 1102 (1894); People v. Dobbins, 73 Cal. 257, 259, 14 P. 860, 861 (1887); In re Yick Wo, 68 Cal. 294, 302, 9 P. 139, 145 (1885), *rev'd on other grounds*, 118 U.S. 356 (1886); Branagan v. Dulaney, 8 Colo. 408, 411, 8 P. 669, 671 (1885) (overruled on ground that statutes not in conflict in Calhoun Gold-Min. Co. v. Ajax Gold-Min. Co., 27 Colo. 1, 59 P. 607 (1899), *aff'd*, 182 U.S. 499 (1901)); Albertson v. State, 9 Neb. 429, 439, 2 N.W. 742, 748 (1879); *see* Stansell v. Fowler, 113 Ga. App. 377, 381, 147 S.E.2d 793, 796 (1966); Sharer v. Hotel Corp. of America, 144 So. 2d 813, 816-17 (Fla. 1962); Jolly v. Atlantic Greyhound Corp., 207 S.C. 1, 4, 35 S.E.2d 42, 44-5 (1945); State v. Ayer, 9 Wash. 2d 188, 193, 114 P.2d 168, 171 (1941); Stiers v. Vrooman, 234 Mo. App. 161, 168, 115 S.W.2d 84, 89 (1938); Woodbury v. Wilson, 133 Me. 329, 332, 117 A. 708, 710 (1935); Marengo County v. Wilcox County, 215 Ala. 640, 643, 112 So. 243, 245 (1927); State v. Board of Commrs., 56 Mont. 355, 358, 185 P. 147, 149 (1919); Commercial Trust Co. v. Hudson County Bd. of Taxation, 86 N.J.L. 424, 430, 92 A. 263, 267 *aff'd*, 87 N.J.L. 179, 92 A. 799 (1914); Calhoun Gold-Min. Co. v. Ajax Gold-Min. Co., 27 Colo. 1, 10, 59 P. 607, 613 (1899), *aff'd*, 182 U.S. 499 (1901).

provides conclusive documentation that Congress intended subsection (b) (5) to authorize the support service contracting which is challenged here.[32] In the fiscal year 1967 NASA budget hearings regarding the use of support service contract personnel, which were held before the Senate Committee on Aeronautical and Space Sciences, NASA stated that during fiscal year 1965, the average number of *contractor employees* working at its centers was about 16,800. NASA stated that this figure would rise to about 22,400 in fiscal year 1966 and to about 24,900 in fiscal year 1967, primarily as a result of the increase in operational activities at the Kennedy Space Center.[33] These contractor employees were in ad-

[32] The Congressional intent to authorize NASA to enter into support service contracts is evident from the authorization laws and appropriations which it enacted. For example, in P.L. 91-126 enacted on Nov. 26, 1969, Congress clearly authorized "support services contracts" to be funded from the "'Research and program management' appropriations" (83 Stat. 197) and thereafter appropriated $678,725,000 to NASA for "Research and Program Management" with the proviso "[t]hat *contracts* may be entered into under this appropriation *for maintenance and operation of facilities, and for other services*, to be provided during the next fiscal year." (83 Stat. 230; emphasis added). This same pattern of authorization and appropriation continued. *E.g.*, 84 Stat. 370, 1449; 85 Stat. 174, 277; 86 Stat. 159, 545. In prior years, going back as far as the Act of June 28, 1965, the authorization for "Administrative operations" included "support services contracts" and the appropriation was similarly worded. *E.g.*, 79 Stat. 193, 534; 80 Stat. 337, 675; 81 Stat. 169, 385; 82 Stat. 281, 945.

[33] The Report to Congress by the Comptroller General dated June 9, 1967 stated *inter alia*:

> NASA, consistent with its policy, has relied heavily over the years on the capabilities of industry to carry out its activities. In response to queries by the Senate Committee on Aeronautical and Space Sciences during the fiscal year 1967 NASA budget authorization hearings

dition to NASA's civil service personnel *ceilings* for fiscal years 1965, 1966, and 1967 of about 33,200, 33,900, and 34,300 respectively.[34] Thus, although the number of civil service personnel had been estimated to increase by only about 1,100 during those three years,[35] the corresponding increase of about 8,100 contractor employees during the same period, estimated to bring the total to 24,900, in excess of the civil service *ceilings* was fully disclosed to Congress, and did not evoke Congressional

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regarding the use of contract personnel, NASA stated that, during fiscal year 1965, the average number of contractor personnel working at its Centers was about 16,800. NASA stated also that the average number of such personnel would rise to about 22,400 in fiscal year 1966 and to about 24,900 in fiscal year 1967 primarily as a result of the increase in operational activities at the Kennedy Space Center. NASA's civil service personnel ceilings for fiscal years 1965, 1966, and 1967 were about 33,200, 33,900, and 34,300, respectively. Thus, although the number of civil service personnel was estimated to increase by about 1,100 during these fiscal years, the corresponding estimated increase of about 8,100 contractor personnel during the same period contemplated a continuing and extensive use of contractor personnel rather than civil service personnel to carry out its activities.

Comptroller General of the United States, Report to the Congress on Potential Savings Available Through Use of Civil Service Rather than Contractor-furnished Employees for Certain Support Services (June, 1967) (J.A. 266-67).

[34] *Id.* at J.A. 267. In those three years, 1965, 1966, and 1967, NASA hired civil service employees up to and slightly beyond those ceilings: In 1965, 1966, and 1967, NASA hired 34,049, 35,708, and 35,860 civil service employees respectively. United States Department of Commerce, Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES, No. 569, at 398 (1968).

[35] The actual increase in civil service employees in those three years was slightly over 1,800, which is about 700 more than the estimate referred to in the text.

opposition—and Congress adopted the appropriations necessary to pay this very substantial number of contractor employees. As noted above, the Congressional policy of favoring support service contracts while cutting back on civil service employment continued after the reduction-in-force in question here.[36] This demonstrates that subject support service contracts, entered into pursuant to the authority of subsection (b)(5) to the magnitude that eventually evolved, were fully within the intendment of Congress.

Thus, even viewing apellee's argument in its most favorable light, appellee would not prevail: under well-settled rules of statutory construction, on the facts of this case and under the applicable statute, subsection (b)(5) would still operate independently of subsection (b)(2) and authorize NASA to enter into contracts for support services to be furnished by employees of the contractors as it did. And since the contractors' employees here in question are not civil service employees, and are not required to be civil service employees, they are not "competing employees in a reduction in force" within the meaning of 5 U.S.C. § 3502, and are not subject to being bumped by civil service employees.[37] Their contracts were outside the civil service laws, and the manner in which

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[36] *See* note 20 *supra*.

[37] It is self evident from the plain language of the statutes pointed to by appellants that the use of contractors' employees to perform necessary work for NASA did not involve any violation of either 31 U.S.C. § 665(a) or 31 U.S.C. § 665(b). 31 U.S.C. § 665 (1970) provides:

> (a) No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for

they were carried out did not violate their terms and bring them within those statutes.

CONCLUSION

For the reasons set forth in this opinion, we find that it was clearly erroneous for the district court to find that 22 of the 32 contracts were invalid *in toto* and that two others were invalid in part on the ground that persons employed by the contractors under these contracts served in an employer-employee relationship with the United States. We therefore vacate those portions of the Summary Judgment and Order of August 12, 1976 that declared 22 contracts and parts of two others null and void and that declared null and void the 1967 reduction-in-force actions taken by NASA. The portion of the Summary Judgment and Order upholding eight contracts and parts of two others is affirmed. The vacated portions of the judgment are remanded to the district court with instructions to enter judgment for the defendants consistent with this opinion.

Judgment accordingly.

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such purpose, unless such contract or obligation is authorized by law.

(b) No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

Supreme Court, U. S.
FILED
SEP 1 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-96

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, EVERETT A. BROUILETTE, EDWARD B. CAMPBELL, WILLIAM ELLETT, NEAL A. EASTER, ELMER GUNTER AND DORIS RODEN, *Petitioners*

v.

ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION; CHAIRMAN AND MEMBERS, CIVIL SERVICE COMMISSION, *Respondents*

and

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES, *Intervenor-Respondent*

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 76-1821

Civil Action No. 3261-67

LODGE 1858, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, ET AL

v.

JAMES E. WEBB, ADMINISTRATOR, NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION, ET AL, *Appellants*
and consolidated case No. 76-1934

BEFORE: MacKinnon and Robb, Circuit Judges.*

FILED APRIL 19, 1978

ORDER

Upon consideration of the petition for rehearing filed by appellees herein, it is

ORDERED by the Court that appellees' aforesaid petition is denied.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

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* Justice Clark was also a member of the panel that heard oral argument in these cases but died before the decision in these cases was announced.

[TITLE OMITTED IN PRINTING]

FILED APRIL 19, 1978

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellees herein, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court *en banc* that appellees' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3261-67

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., *Plaintiffs*

v.

ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., *Defendants*

and

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES, *Intervenor-Defendant*

Filed Nov. 30, 1973

MEMORANDUM OPINION

This action is before the Court on plaintiffs' Motion for Summary Judgment, intervenor's Motion to Dismiss the Complaint and defendants' Cross Motion for Summary Judgment.

Plaintiffs are six former civil service employees of the National Aeronautics and Space Administration who were located at the Marshall Space Flight Center (Marshall), in Huntsville, Alabama and Lodge 1858 of the American Federation of Government Employees, the union which serves as the sole bargaining agent for all civil servants at Marshall. Defendants are the Administrator of NASA and the members of the Civil Service Commission (CSC). Intervenor is the National Council of Technical Service Industries (NCTSI), a non-profit corporation comprised of companies which contract with various Federal agencies, including NASA, to supply support services.

The plaintiffs allege in their complaint that NASA has entered unlawfully into contracts with private firms to

procure manpower to perform tasks which the agency is required by statute to have performed by civil servants. The plaintiffs also claim that, as a result of NASA budget cuts, the individual plaintiffs and about 760 other civil servants at Marshall were, on December 6, 1967, notified that they would be subjected to reduction in force (RIF) actions, either terminating their employment or reducing their grade levels, while private contractor employees, performing the same tasks as plaintiffs, were not to be affected by the RIF actions. These employment practices by NASA are alleged to violate:

1. the provision of the NASA enabling act which limits NASA to 425 non-civil service personnel, 42 U.S.C. 2473 (b)(2) (1964);

2. the several civil service laws and the regulations promulgated pursuant thereto, 5 U.S.C. 2101, et seq. and 5 C.F.R. 1.1 et seq.;

3. The Union's collective bargaining agreement with NASA.

In their amended complaint filed on October 7, 1970 the plaintiffs seek declaratory judgments, injunctive relief, reinstatement and an award of back pay and employment benefits.

Prior Proceedings in the Case

On December 6, 1967, as a result of NASA budget cuts, the individual plaintiffs and about 760 other civil servants received RIF notices informing them that they would either be reduced in grade or separated from government service effective January 13, 1968.

On December 27, 1967 the plaintiffs filed this suit and moved for a preliminary injunction against the RIF.

On January 11, 1968 the late Judge Alexander Holtzoff of this Court granted the requested preliminary injunction halting the RIF which was to become effective on January 13, 1968 noting in his Findings of Fact:

> "... NASA and the Civil Service Commission are in the process of harmonizing NASA's operational needs and service contract policies of the Marshall Space Flight Center, with the legal requirements and Commission policies under the civil service laws. And NASA is itself in the process of evaluating the NASA operations at that Center, to insure that, in accord with established NASA personnel policy, no civil service employee is separated or reduced in grade or pay in the reduction-in-force actions while non-Government (contractor) personnel performing the same function continue to work on site at the Center under service contracts currently in effect with private contractors."

Judge Holtzoff made it clear that the only purpose of granting the injunction was to preserve the status quo pending resolution of the differences between the Civil Service Commission and NASA as to the legality of the R.I.F. (See page 3 of Judge Holtzoff's April 24, 1968 opinion dismissing the case).

On February 26, 1968 the Civil Service Commission and NASA filed an agreement which provided that all but 166 of the 764 RIF notices were to be canceled. On March 12, 1968 the preliminary injunction was dissolved and on April 24, 1968 the defendant's motion to dismiss the case was granted on the basis that the individual plaintiffs still affected had not exhausted their administrative remedies. Plaintiffs appealed.

On appeal appellees argued that the dismissal was prope not only for non-exhaustion of administrative remedies but also because appellants lacked standing to challenge NASA's support service contracting policies. This issue had been raised by NCTSI in its Answer to the Complaint. The Court of Appeals in their April 21, 1970 opinion [1] found

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[1] *Lodge 1858 American Federation of Government Employees v. Paine*, 436 F. 2d 882 (D.C. Cir.).

that appellants did have standing. The Court never reached the exhaustion issue because one week before argument of the case before the Court of Appeals the Civil Service Commission's Board of Appeals and Review rendered its final decision stating:

> "[a] decision to carry out some of its functions by using other than Federal civilian employees is a matter solely within the administrative discretion of the agency and the propriety of such a decision is not subject to review or modification by the Civil Service Commission in the adjudication of the reduction-in-force appeal of any federal civilian employee affected thereby."

In view of this development the Court of Appeals granted appellants "leave to file a supplemental pleading alleging exhaustion of administrative remedies . . ." and directing the District Court to "proceed to solve all aspects of this case on the merits.[2]

Plaintiffs filed a supplemental and amended complaint on October 7, 1970 alleging that administrative remedies had been exhausted as to all plaintiffs.

Plaintiffs' motion for summary judgment presently before the Court was filed on September 9, 1971. Defendants' cross motion for summary judgment was filed November 29, 1971 and Intervenor's motion to dismiss the complaint was filed December 3, 1971.

Statement of Material Facts

The plaintiffs in accordance with rule 1-9(g) of the Rules of the United States District Court for the District of Columbia have filed a statement of material facts as to which they contend there is no genuine issue.

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[2] *Lodge 1858 American Federation of Government Employees v. Paine, supra note 1 at page 898.*

Plaintiffs contend that after Judge Holtzoff dissolved the preliminary injunction and NASA proceeded with that portion of the RIF not subject to the NASA—Civil Service Commission agreement, 161 employees in the class represented by plaintiff either lost their jobs or suffered reductions in grade while NASA continued to employ over 5,000 non-civil service contractor employees supplied by 9 private companies to perform regular NASA work functions. Specifically, Everett A. Brouillettee, one of the named plaintiffs, after 21 years of civil service was reduced in grade, and suffered a salary cut from $12,000 per year to $8,000 per year and had his former job functions assigned to contractor employees of Hayes International Corp., who formerly had worked side-by-side with Mr. Brouillettee at the Manufacturing Engineering Laboratory. Four of the other five named plaintiffs were removed from their positions totally while contractor employees continued to perform work substantially similar to that formerly done by these civil servants. The remaining named plaintiff retained his employment at the same level pursuant to the NASA—Civil Service Commission agreement.

At the time this suit was filed in 1967, NASA had 12 support service contracts with private companies through which 8,218 contractor employees were utilized in NASA operations at a cost to NASA of approximately 70 million dollars per year. The contract employees filled positions that ranged from janitors, guards, refuse collectors, drivers and clerical employees to technicians, engineers, doctors and scientific personnel.

The contracts were negotiated in terms of the number of "man-years" to be supplied by a firm. Often the firm awarded the contract would then subcontract for either all or a portion of the man-years to be suplied. The contracts were for a one-year term with the total duration of the contracts not to exceed five years. The contracts in effect when this suit was filed were originally entered into in 1965 and they continued in effect until 1969 when they expired by

their own terms. NASA then extended them until 1971 and also announced it was going to negotiate nine new contracts.

The contract employees in major part worked at the Marshall Space Flight Center in government buildings, in the same work areas as civil servants, using government equipment. The contractor employees in Management Services, Technical Services and in the laboratories received their assignments from the civil service directors of the office or lab or from one of his civil service assistants in the following manner: The civil service director would prepare written work assignments which would be given to the contractor's designated representative in the lab or office who would pass the assignment on to the contractor personnel; and when the assignment was completed it then had to be accepted and approved by the originating civil service director.

The work performed by the contractor employees could have been performed by civil service employees who were available through the Civil Service system. In some instances work satisfactorily performed by civil service employees was reassigned to contractor employees solely because of NASA's management philosophy favoring support service contracts. Mr. Dieter Grau, Director of the Quality and Reliability Assurance Laboratory and Mr. Helmut Hoelzer, Director of the Computation Laboratory, both testified in their depositions that they had specifically requested that certain functions in their laboratories be performed by civil service employees and the NASA management had denied their requests and directed them to utilize contractor employees.

Mr. John Will, Director of Personnel for the U. S. Department of Commerce at the request of the Civil Service Commission, conducted a study of NASA's personnel practices in January of 1968. His report (dated January 15, 1968) concluded that at the Marshall Space Flight Center

there were two separate personnel systems, the Civil Service system run by the Director of Personnel and the contractor employee system run by the Purchasing Office. There was little coordination between the offices and when new work requirements developed the strong tendency was to contract for the employees with little consideration given to the relative merits of each system in supplying the needed employees. NASA considered the support service contracts preferable largely because they were thought to afford more flexibility when the work force had to be increased or decreased rapidly. Mr. Wills found that similar flexibility could be achieved through the Civil Service System by using appointments classified as: (1) Temporary, (2) unless-actually employed or (3) experts and consultants.

On June 9, 1967 the Comptroller General of the United States reported to Congress that he had conducted a cost review of three support service contracts at Marshall and six contracts at Goddard Space Flight Center and it was concluded that if civil service employees were used instead of contractor employees for these functions, NASA would realize an estimated annual savings of 5.3 million dollars.

In October of 1967, the General Counsel to the Civil Service Commission rendered a written opinion (the Pellerzi opinion) which examined two representative support service contracts at Goddard Space Flight Center and concluded that they created an employer-employee relationship between the private employees and NASA which violated the Civil Service laws.

In response to the above opinion NASA promised to rectify all violations. However, they still employ thousands of contractor employees and renew support service contracts while civil service employees are being subjected to RIF's. In an effort to eliminate the appearance of improper service contract operations at Marshall NASA took the following actions.

1. Caused partitions to be constructed to physically segregate contractor employees;

2. Moved some contractor employees away from the Marshall Center even though they continued to perform the same work under civil service supervisors;

3. Issued the following direction to its management personnel:

> "Each of us should devote more time to defining the roles of Civil Service and Support Contractor people with the organizations. As a minimum, the support contractors may be moved to an out-of-house operation. Our direction to the contractors must become more formal and the Civil Service personnel must work more independently from the support contractors. . . . Mr. Cook and legal people surveyed the physical location relationship of support contractors and civil service people within the Laboratory. Generally it was good, but there are still some Technical Directives (TD's) and questioned use of the statement '. . . for further information contact . . .'. This statement should be left off future TD's."

On February 8, 1968 Chairman Macy of the Civil Service Commission in a "Memorandum for the Record" stated, *inter alia,* that when the then existing contracts expired in the next few months, "a joint NASA-CSC review will be conducted to determine whether the support functions to be performed should be continued under contract or transferred to Civil Service staffing. The review will be made on site to permit not only a study of the contract provisions but an inspection of the actual performance of the work." General Counsel Mondello of the Civil Service Commission testified in his deposition that he could not recall any such review having been made after Chairman Macy's memorandum.

NASA continues to renew its support service contracts and made nine new contracts effective in mid-1971. The contracts can be terminated on any anniversary date without cost to the government.

Defendant's Opposition

In the defendants' opposition to the plaintiffs' motion for summary judgment they incorporate their statement of material facts and their memorandum of points and authorities in support of their cross-motion for summary judgment and in addition state:

> "Furthermore, in order to avoid any possibility the Court may assume that Government defendants do not controvert the 'Plaintiffs' Statement [of Facts] Pursuant to Local Rule 9(h)'[1] which plaintiffs filed herein on September 8, 1971 in support of their 'Plaintiffs' Motion for Summary Judgment', Government defendants add the following Statement for purposes of Local Rule 9(h):
>
> "1. Government defendants genuinely dispute that there is in existence today at NASA's George C. Marshall Space Flight Center any close direct supervision by NASA employees of any private contractor employees engaged in on-site 'support service' contract work, or any other undesirable feature, warranting intra-Executive Department corrective action.
>
> "2. Government defendants also genuinely dispute plaintiffs' assertion that NASA and the CSC did not jointly review the support-service' contractual arrangements in force at Marshall. And in no event are these material facts for judicial trial."

The Court has concluded that the material facts stated by plaintiffs exist without substantial controversy and that the exceptions of the defendants, noted above, are not gen-

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[1] Under the revised U. S. District Court Rules adopted on August 1, 1973, Rule 1-9(g) has been substituted for Rule 9(h).

uine issues of material facts that preclude the granting of a partial summary judgment on the pending cross-motions for summary judgment.

The Critical Issue Involved

The initial issue facing the Court for resolution is whether the support service contracts in effect at the Marshall Space Flight Center violate the personnel procurement restrictions of the NASA enabling act as delineated in 22 U.S.C. 2473(b)(2) or whether they fall within the scope of the broad contracting authority granted to NASA by 42 U.S.C. 2473(b)(5).

Reconciliation of 14 U.S.C. 2473(b)(2) And 42 U.S.C. 2473(b)(5)

42 U.S.C. 2473(b)(2) provides:

"(b) In the performance of its functions the Administration [NASA] is authorized— . . .

"(2) to appoint and fix the compensation of such officers and employees as may be necessary to carry out such functions. *Such officers and employees shall be appointed in accordance with the civil service laws and their compensation fixed in accordance with the Classification Act of 1949, except that (A) to the extent the Administration deems such action necessary to the discharge of his responsibilities, he may appoint not more than four hundred and twenty-five of the scientific, engineering and administrative personnel of the Administration without regard to such laws,* and may fix the compensation of such personnel not in excess of the highest rate of grade 18 of the General Schedule of the Classification Act of 1949, as amended, and (B) to the extent the Administrator deems such action necessary to recruit specially qualified scientific and engineering talent, he may establish the entrance grade for scientific and engineering personnel without

previous service in the Federal Government at a level up two grades higher than the grade provided for such personnel under the General Schedule established by the Classification Act of 1949, and fix their compensation accordingly;" (Underscoring supplied).

42 U.S.C. 2473(b)(5) provides:

"(b) In the performance of its functions the Administration is authorized— . . .

"(5) Without regard to section 529 of Title 31, to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution. To the maximum extent practicable and consistent with the accomplishment of the purpose of this chapter, such contracts, leases, agreements, and other transactions shall be allocated by the Administrator in a manner which will enable small-business concerns to participate equitably and proportionately in the conduct of the work of the Administration;"

The plaintiffs contend that the meaning of Section 2473 of (b)(2) is plain on its face and NASA must utilize civil servants to perform all its functions with the exception of 425 scientific, engineering and administrative employees.

The defendants maintain that the proper reading of Section 2473 (b)(2) is that NASA is given authority to decide how many, if any, civil servants it will need to carry out its functions and it is only after this decision is made that the succeeding part of Section 2473(b)(2) becomes operative to make it mandatory that such employees "be appointed in accordance with the civil service laws" and their compen-

sation fixed in accordance with the Classification Act provisions. Under this rather strained construction NASA's administrator could decide that no civil servants are necessary for NASA to fulfill its mission and then contract out for all its employees and pay them without regard to the federal salary schedule, thus avoiding the stricture of Section 2473(b)(2) altogether. The Court has concluded that the defendants' construction is inconsistent with the plain language of Section 2473(b)(2) and with the Congressional intent evidenced in the legislative history of the NASA enabling act.

In House Report No. 1770, May 24, 1958 (1958 U.S. Code Cong. and Admin. News, pg. 1360, et seq.) which accompanied the bill, H.R. 12575, which eventually was enacted into law, the committee stated at page 3168:

> "Changes have also been made in certain administrative provisions. Some of these provisions deserve brief discussion.
>
> "(1) Much thought has been given to the compensation of agency officers and employees. The previous bill authorized the agency to fix rates of pay which were "reasonably comparable with prevailing rates paid by non-Federal employers for similar work." This provision would have exempted the agency completely from the Classification Act of 1949. No limit was set either to the rates of pay or to the number of recipients. *While recognizing that the agency would need authority to pay higher compensation than the Classification Act allows, in order to recruit and hold qualified scientists and engineers, your committee concluded that unlimited authority was unnecessary and would lead to harmful consequences.* With unlimited authority to fix rates of pay, the new agency would make raids on the scientific and engineering personnel of other agencies engaged in programs of equally high priority. In turn, it could still be outbid by private companies

> holding cost-plus contracts with the Federal Government. This competition with other agencies and with private contractors might cause a pay spiral that would greatly increase the cost of all programs requiring scientific and engineering services, and, in addition to widespread harmful effects, would defeat the purpose of the pay provision. *Certain other consequences of unlimited authority to fix rates of pay, such as the distortion of the civil service retirement system would also be undesirable."* (Underscoring supplied).

The committee also stated at page 3163 that:

> "As the committee entered upon final drafting of H.R. 12575, it sat in executive session with representatives of the NACA, the Bureau of the Budget, the Comptroller General, and other agencies to insure that the committee would have the full benefit of any final suggestion from these agencies. *It would not be correct to state that everything the administration desires has been included. For example, the committee does not recommend the exemption of all space agency employees from the civil-service classification rules and salary scales, however meritorious in principle, because it believes that such a recommendation would exceed the practical limits of its responsibilities.* The recommendation of the committee represent its best judgment of what will accomplish the objectives of both the administration and the Congress with the least distraction by side issues which might impede passage of the bill at the earliest opportunity." (Underscoring supplied).

Although it seems clear that the defendants' interpretation of the language of Section 2473(b)(2) is incorrect, the Court still must reconcile that Section with the provisions of Section 2473(b)(5).

House Report 1770, supra, specifically states at page 3178 the intention of Congress to give NASA broad contractual authority:

> "Paragraph (5) gives the Administrator broad authority to enter into and perform contracts on such terms and for such periods as he deems appropriate with any public or private agency, firm, educational institution, or other person . . ."

The government contends that support service contracts were intended to be within the ambit of this broad contractual power. They support this contention by drawing the Court's attention to the fact that each annual NASA Authorization Act since 1966 has provided:

> "When so specified in an Appropriation Act for the National Aeronautics and Space Administration, (1) any amount appropriate for 'Research and development' or for 'Construction of facilities' may remain available without fiscal year limitation, and (2) maintenance and operation of facilities, and support service contracts may be entered into under the 'Research and program management' appropriation for periods not in excess of twelve months beginning at any time during the fiscal year."

Even though Sec. 2473(b)(5) confers upon the Administrator of NASA the right to contract, even "broadly", it does not include the right to contract illegally, i.e., in contravention of the express provisions of Sec. 2473(b)(2). Nothing in the language or the legislative history of the NASA enabling act persuades the Court to conclude that Congress intended the provisions of Sec. 2473(b)(5) to be the vehicle for nullifying the requirement of Sec. 2473 (b)(2) that "officers and *employees* of NASA shall" be appointed and paid in accordance with the civil service laws. Defendants argue that Congress' passage of appropriation acts allowing for such contracting out of the work demon-

strates a Congressional intent to authorize the practice. This Court disagrees. In *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F. 2d 783 (C.C.A., D.C. 1971), the Atomic Energy Commission argued that in spite of the provisions of the National Environmental Policy Act, 42 U.S.C. Sec. 4332, et seq. the Commission had the right to conduct tests without detailed compliance with NEPA because Congress had passed authorization and appropriation bills for said tests. In rejecting that argument the Court of Appeals stated, at page 785:

> "Congress must be free to provide authorizations and appropriations for projects proposed by the Executive even though claims of illegality . . . are pending in the courts. There is, of course, nothing inconsistent with adoption of appropriations and authorizations measures on the pro tanto assumption of validity, while leaving any 'claim of invalidity to be determined by the courts."

Furthermore, the fact that Congress has recognized in an Appropriation Act that "support services contracts" are being or may be entered into is inapposite to the precise issue here. The Court is not deciding, nor do the plaintiffs contend, that all contracts lumped generally under the appellation of "support service contracts" are illegal. The Court must simply decide whether or not the contracts *in question here*, no matter what they are called, make non-civil servants NASA employees in contravention of the clear direction of Sec. 2473(b)(2) that NASA *employees* shall be appointed and paid according to the civil service laws.

Employer—Employee Relationship

The undisputed facts in this case establish per-adventure that in December, 1963, plaintiffs, civil servants, employed at NASA were the subject of a reduction-in-force while contract, non-civil servants, were not the subject of such reduction but continued to perform work at NASA similar

to that performed by plaintiffs and on the same job sites. If these contract, non-civil servants were NASA employees then it is clear that plaintiffs were removed and/or reduced in grade and pay in violation of their retention preference rights, particularly the applicable provisions of Title 5 United States Code Section 3501, et seq. and 5 Code of Federal Regulations, 351 et seq. entitled "reductions in force".

In 1967 General Counsel Pellerzi of the Civil Service Commission undertook an in depth study [4] (Defendants' exhibit 8b to their cross-motion for summary judgment) of two representative NASA support service contracts at the Goddard Space Center. The General Counsel's opinion states at page 4:

> "The Commission's authority and responsibility to interpret and administer the personnel laws to effectuate their purposes has long been recognized by the Attorney General, by the Congress, and the courts. See H.R. Rep. No. 188, 89th Cong., 1st Sess. (1965), and authorities cited therein; see also *Born v. Allen*, 291 F.2d 345 (D.C. Cir. 196); *Adelstein, et al. v. Macy, et al.* 265 F. Supp. 171 (E.D.N.Y. 1967).
>
> ...it has been the Civil Service Comission's experience that the procurement and use of personnel by unauthorized contracting practices has an adverse impact upon the civil service system and tends to frustrate the purposes and national policies expressed by the personnel laws."

With this statement of authority and purpose, the General Counsel proceeded to examine the work relationship established by the support service contracts between contractor-employees and NASA against the criteria of what constitutes a civil service employee under the provisions of 5 U.S.C. 2105(a). This section states:

[4] Hereinafter "Pellerzi opinion".

> "(a) For the purpose of this title, 'employee', except as otherwise provided by this section or when specifically modified, means an officer and an individual who is—
>
> (1) appointed in the civil service by one of the following acting in an official capacity—
>
> (A) the President;
>
> (B) a Member or Members of Congress, or the Congress;
>
> (C) a member of a uniformed service;
>
> (D) an individual who is an employee under this section;
>
> (E) the head of a Government controlled corporation; or
>
> (F) the adjutants general designated by the Secretary concerned under section 709(c) of title 32, United States Code;
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position."

The opinion concludes after a lengthy, detailed discussion of the particular provisions of the contracts, the actual performance of contracts at Goddard and the legal standards to be applied that the contracts did establish an employer-employee relationship contrary to the civil service laws and that:

> "In the absence of clear legislation expressly authorizing the procurement of personnel to perform the regular functions of agencies without regard to the personnel laws, we must insist on scrupulous adherence

to those laws and the policies they embody. Accordingly, contracts which, when realistically viewed, contain all the following elements, each to any substantial degree, either in the terms of the contract, or in its performance, constitute the procurement of personal services proscribed by the personnel laws.

—Performance on-site

—Principal tools and equipment furnished by the Government

—Services are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission

—Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel

—The need for the type of service provided can reasonably be expected to last beyond one year

—The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order:

—To adequately protect the Government's interest or

—To retain control of the function involved, or

—To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

"Applying these standards,[5] the contracts under review and all like them are proscribed unless an agency

[5] Hereinafter "Pellerzi standards"

possesses a specific exception from the personnel laws to procure personal services by contract."

The Court is of the opinion that the standards set forth in Pellerzi opinion should be applied in deciding whether or not an employer-employee relationship has been established between NASA and the private contractor employees by the terms and performance of each of the support service contracts at issue here.

The Supreme Court in the case of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) stated at page 381:

> "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . ." [Emphasis supplied.]

In *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F. 2d 689, 1971 Judge Leventhal of the D. C. Circuit stated at page 696:

> "They [the courts] are to accord 'great deference to the interpretation given the statute by the officers or agency charged with its administration'." [citing *Udall v. Tallman*, 380 U.S. 1 (1965).

The authorities for this proposition are myriad and the defendants in opposing the application of the Pellerzi standards to the subject contracts present no convincing argument that the interpretation of the statute contained in the opinion is not sound.

Based upon all of the foregoing this Court has concluded that a partial summary judgment should be granted to the plaintiffs declaring that 42 U.S.C. Section 2473(b)(2) requires NASA to appoint all of its officers and employees in

excess of 425 of the scientific, engineering and administrative personnel in accordance with the Civil Service laws and prohibits the Administrator of NASA from entering into contracts and enforcing contracts with Intervenors or others that make non-civil service employees NASA employees as defined in the Pellerzi opinion, and that all such contracts in existence on December 6, 1967, and at present, were and are null and void.

This case will be referred to the Civil Service Commission with directions to apply the "Pellerzi Standards" and determine whether the relationship of employer-employee exists between NASA and the contract non-civil service employeees involved in this case, and report its findings to this Court within 60 days from the date hereof.

Defendants' cross-motion for summary judgment and Intervenor's motion to dismiss will each be denied. Plaintiff's prayers for injunctive relief, reinstatement, back pay, and employment benefits will be held in abeyance pending further proceedings subsequent to receipt of the report of the Civil Service Commission.

Date: December 30, 1973

/s/ JOSEPH C. WADDY
Judge

[Caption deleted in printing]

Filed Aug. 12, 1976

MEMORANDUM OPINION

This is a suit for declaratory judgment and injunctive relief arising out of a reduction-in-force (RIF) action, resulting from budget cuts, among civil service personnel at the George C. Marshall Space Flight Center, Huntsville, Alabama (the Marshall Center).

Plaintiffs are (1) Lodge 1858, American Federation of Government Employees, a labor organization recognized by the National Aeronautics and Space Administration (NASA) as the exclusive bargaining agent under Executive Order 10988 for all civil service employees at the Marshall Center; and (2) six named individual civil service employees. Pursuant to the RIF action, the individual plaintiffs and about 760 other civil servants received notices on December 6, 1967, informing them that they would either be reduced-in-grade or separated from government service effective January 13, 1968.

Defendants are the Administrator of NASA and the Chairman and Members of the Civil Service Commission. Defendant-intervenor is the National Council of Technical Service Industries (NCTSI), a non-profit corporation comprised of companies which contract with various Federal agencies, including NASA, to supply support services.

Plaintiffs contend that NASA violated the personnel procurement restrictions of its enabling Act, The National Aeronautics and Space Act of 1958, as amended, as such are delineated in 42 U.S.C. § 4273(b)(2), as well as other federal statutes relating to the hiring, retention and employment of civil service employees by instituting a RIF among civil service employees when support service contractor and sub-contractor employees were allegedly performing work reserved to civil service personnel. Plaintiffs also

contend the RIF violated the Unions' collective bargaining contract with NASA.

Plaintiffs seek a declaration that the RIF action and various support service contracts are unlawful and an injunction restraining and enjoining NASA from continuing to enter into and perform such support service contracts. Plaintiffs also seek reinstatement of the affected civil service employees to the positions, grades and classifications from which they were separated by reason of the RIF and NASA's contracting practices, and an award of back pay and employee benefits.[1]

The case is before the Court on the motion of plaintiffs for final summary judgment and the cross-motions of defendants and NCTSI for summary. Also pending is a ruling on an Order to Show Cause why defendants should not be held in contempt for failing to comply with the Court's Orders of November 30, and Decembr 21, 1973.[2]

I. History of the Case

Shortly after the case was filed in 1967, the late Judge Alexander Holtzoff granted plainitffs' motion for preliminary injunction and enjoined the RIF action at the Marshall Center. Defendants thereafter advised the Court by means of a memorandum denominated *"NASA-CSC Agreement on the MSFC Reduction-in-Force"* that all but approximately 166 separation and reduction in grade notices [3] to civil service employees at the Marshall Center were being cancelled due to the existence of improper support service

[1] Plaintiffs' Supplemental and Amended Complaint for Declaratory Judgment and Injunction filed October 7, 1970.

[2] The Order to Show Cause was taken under advisement after a hearing on April 22, 1974.

[3] Of the 166 notices which were not cancelled, approximately 56 involved employee separations and approximately 110 involved reductions-in-grade.

contract operations. On defendants' motions, the Court, by Order dated March 12, 1968, vacated the injunction "without prejudice to any administrative remedies that may be possessed by such individual employees in whose cases NASA now effectuates its RIF actions under the Agreement reached between the Civil Service Commission and NASA." The complaint was dismissed April 18, 1968, and plaintiffs appealed.

On April 21, 1970, the United States Court of Appeals for this Circuit reversed and remanded the case for further proceedings on the merits. *Lodge 1858, American Federation of Government Employees* v. *Paine,* 436 F. 2d 882 (D.C. Cir. 1970).[4] Upon the completion of lengthy discovery proceedings, plaintiffs moved for summary judgment, defendants cross-moved for summary judgment, and NCTSI moved to dismiss the complaint.

On November 30, 1973, partial summary judgment was granted to plaintiffs. This Court ruled that the six elements or standards [5] set forth in an opinion written in October 1967 by Leo Pellerzi, then General Counsel of the Civil Service Commission, as to the legality of two representative NASA support service contracts at the Goddard Space Center represented the appropriate "standards of review to be applied in determining whether or not an employer-

[4] The Court of Appeals recognized, *inter alia,* that plaintiff Lodge 1858, American Federation of Government Employees, had standing to sue on behalf of its members, and that NCTSI had standing to intervene as a defendant on behalf of its members. Furthermore, since during the time which elapsed between entry of the District Court's order of dismissal and the Court of Appeals decision, the administrative remedy had been exhausted, the Court held that the doctrine of exhaustion of administrative remedies " • • • erect[ed] no barrier to prosecution of this suit on the merits" and suggested a supplemental pleading alleging exhaustion be filed. 436 F. 2d at 898.

[5] Hereinafter the "Pellerzi Standards" or "Pellerzi Elements".

employee relationship has been established between NASA and private contractor employees by the terms and performance of each of the support service contracts."

Quoting from General Counsel Pellerzi's Opinion, the Pellerzi Standards are set forth in the Court's Memorandum Opinion at pages 20-21 as follows:

> "In the absence of clear legislation expressly authorizing the procurement of personnel to perform the regular functions of agencies without regard to the personnel laws, we must insist on scrupulous adherence to those laws and the policies they embody. Accordingly, contracts which, when realistically viewed, contain all the following elements, each to any substantial degree either in the terms of the contract, or in its performance, constitute the procurement of personal services proscribed by the personnel laws.
>
> —Performance on-site
>
> —Principal tools and equipment furnished by the Government
>
> —Services are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission
>
> —Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel
>
> —The need for the type of service provided can reasonably be expected to last beyond one year
>
> —The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order:
>
> —To adequately protect the Government's interest or

> —To retain control of the function involved, or
>
> —To retain full personal responsibility for the function supported in a duly authorized Federal officer of employee.
>
> "Applying these standards, the contracts under review and all like them are proscribed unless an agency possesses a specific exception from the personnel laws to procure personal services by contract."

The Court concluded at page 22 of the Opinion that

> ". . . 42 U.S.C. Section 2473(b)(2) requires NASA to appoint all of its officers and employees in excess of 425 of the scientific, engineering and administrative personnel in accordance with the Civil Service laws and prohibits the Administrator of NASA from entering into contracts and enforcing contracts with Intervenors or others that make non-civil service employees NASA employees as defined in the Pellerzi Opinion, and that all such contracts in existence on December 6, 1967, and at present, were and are null and void."

The Court ordered further proceedings held in abeyance and referred the case to the Civil Service Commission (Commission) with instructions to investigate the involved support service contracts and to apply the Pellerzi Standards to

> "determine whether the relationship of employer-employees existed on December 6, 1967, and exists at the present time between National Aeronautics and Space Administration and the contractor non-civil service employees involved in this case, and report its finding to this Court within 60 days from the date hereof."

Defendants then moved for clarification of the November 30, 1973 Order, requesting that the Court's references to the Pellerzi Standards include the interpretation rendered in a supplemental opinion by the subsequent General Counsel of the Civil Service Commission, Anthony L. Mondello, on July 5, 1968.* On December 21, 1973, the Court ruled that

> ". . . the Mondello Supplement did not modify or change the 'Pellerzi Standards' but, as stated in the Supplement, its purpose was '. . . to *clarify* the meaning of these (Pellerzi) elements and the scope of the opinion in order to ensure that support service contracts are not drafted or performed in a manner which will evade the requirements of the personnel laws'; and * * * [the] supplement did not add any new or different standards or cancel or delete any of the 'Pellerzi Standards' but reaffirmed them and supplied the clarification thereof." (Emphasis in Original)

On February 19, 1974, defendants submitted proposed Commission steps to implement the Court's mandate and moved for an extension of time for the Commission to complete its investigation and report its findings back to the Court. Included therein was a letter dated February 1, 1974, from the office of the United States Attorney as defense counsel to the Commission's General Counsel Anthony Mondello. In pertinent part, that letter reads:

> ". . . We advise that the Commission must apply the 'six elements' enumerated in the 'Pellerzi Opinion', subject to the emphasis or clarification supplied in the * * *' Mondello Opinion'.
>
> "This means that, with particular reference to the 'sixth element' in the 'Pellerzi Opinion', that of proscribed supervision: Under the terms of Judge Waddy's mandate, the investigation must determine

* Hereinafter the "Mondello Supplement".

> whether the terms of the contract, or the actual operations thereunder, disclose the indicated substantial degree of supervision creating a relationship tantamount to that of employer-employee. In this regard, sporadic supervision of an individual (one of numerous contractor employees) may be ignored, but relatively continuous, close supervision of the private contractor employees by NASA supervisors must be taken into account. Under the reasonable approach which must be taken for each and every one of the six elements listed in the 'Pellerzi Opinion', to be in violation of the 'sixth element', the NASA supervision must be of a substantial number of contractor employees."

On April 2, 1974, the Court entered an order denying defendants' motion for an extension of time and "for Court approval of the proposed Civil Service Commission steps, which differ from the Court's Order of November 30, 1973 and which further delay implementation of said Order". On April 22, 1974, the Court took under advisement plaintiffs' motion to hold defendants in contempt for failure to comply with this Court's Orders dated November 30, and December 21, 1973.

From March 11, 1974 through April 5, 1974, the Commission examined thirty-two (32) support service contracts in force at the Marshall Center, including the satellite operations known as Mississippi Test Facility (MTF), located at Bay St. Louis, Mississippi, and the Michoud Assembly Facility (Michoud), located at New Orleans, Louisiana. Five of these contracts were viewed by the Commission as within the purview of this Court's Order although they had not originally been identified as within the litigation.

The Commission submitted its Report on May 30, 1974, concluding that none of the 32 NASA support contracts investigated created a relationship tantamount to that of employer-employee. The Commission's filing consisted of a *"Summary Report"* and 32 individual reports covering

each of the NASA support service contracts. Some of these contracts had been in effect in 1967 when the RIF challenged herein occurred; the others were either follow-on or replacement contracts in effect when the Commission investigation was undertaken. The individual reports contain copies of the contracts and modifications thereto, affidavits of involved personnel, and other evidentiary material accumulated in connection with the investigation and report preparation. A summary of the Commision's conclusions is as follows:

(1) Of the 12 contracts in effect at the Marshall Center in 1967

—None were found to involve Government Supervision (Pellerzi Element 6)

—Additionally, three were found to have been performed off-site (Pellerzi Element 1); and two of these three were also found not to involve the use of Government Equipment (Pellerzi Element 2);

(2) Of the 12 contracts in effect at the Marshall Center at the time of the investigation

—None were found to involve Government Supervision (Pellerzi Element 6)

—Additionally, two were found to have been performed off-site (Element 1);

(3) Of the eight Government-owned, Contractor-operated (GOCO) type contracts at the Mississippi Test Facility and the Michoud Assembly

—None were found to involve Government Supervision (Element 6)

—Additionally, five did not meet the integral effort standard (Element 3).

Thus, 22 of the 32 contracts investigated were found to contain all of the Pellerzi Elements except Element 6, Government Supervision; eight of the contracts involved all but two of the Pellerzi Elements; and two of the contracts involved only three of the Pellerzi Elements.

The Commission's *Summary Report*, at *Section VI. Results of Application of the "Pellerzi Standards"*, states in relevant part:

> "A critical issue discussed in [the letter from the Office of the U. S. Attorney dated February 1, 1974 to General Counsel Mondello] had to do with the application of the 'Pellerzi Standards' and the effect, if any, of the 'Mondello Opinion'. The crux of this discussion was that in order for a determination to be made that a relationship is tantamount to employer-employee existed: (1) all six of the 'Pellerzi Standards' elements had to be present, each to a substantial degree, and (2) *with regard to the sixth element, relatively continuous, close supervision of a substantial number of contractor employees must be present* and must be shown to be related to one of the following requirements, '(a) to adequately protect the Government's interest, or (b) to retain control of the function involved, or (c) to retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.'
>
> "Therefore, the determinations [illegible] in the individual reports, * * * were made in accordance with the instructions given by the Office of the U. S. Attorney." (Emphasis supplied) [1]

[1] "Review of Support-Service Contracting—NASA", Summary Report, by the U. S. Civil Service Commission, May, 1974, at page 11.

II. The Present Controversy

In their motion for final summary judgment, plaintiffs have made various challenges to the manner in which the Commission applied the Pellerzi standards and the conclusions reached. In plaintiffs' view, the Commission was misdirected and misled by government counsel as to the correct application of the Pellerzi Elements, particularly with respect to the sixth elements, and that the Commission's conclusions are therefore arbitrary and capricious. They urge this Court to consider all of the evidence and find the preponderance of the evidence supports the conclusion that an unlawful employer-employee relationship existed, and continues to exist under the support service contracts reviewed.

Defendants and defendant-intervenor NCTSI take the position that the Commission properly applied the Pellerzi Standards, as clarified by the Mondello Supplement. They contend there has been a fair and bona fide investigation which produced evidence supporting the Commission's findings and that the conclusions are not arbitrary and capricious. Defendants maintain that since the Commission was given the investigatory task because of its "special competence in the field", its reports should be given great weight by the Court under the rationale of *Wheelabrator Corporation v. Chaffe,* 455 F.2d 1306 (D.C. Cir. 1972). Defendant-intervenor NCTSI also places reliance on the *Wheelabrator* case, contending that although the Court is not bound by the Commission's findings and conclusions, they should be given very substantial consideration and weight. Each urges that their respective motions for summary judgment be granted.

Turning first to the threshold question of how much weight is to be accorded to the Commission's investigation and reports, the Court notes that our Court of Appeals held in *Wheelabrator Corporation* v. *Chaffe, supra* at 1316, that:

> "Under the doctrine of primary jurisdiction, a court may entertain an action for permanent relief and defer its consideration of the merits until an agency 'with a special competence' in the field has ruled on the issues, * * * The court has the last word, but it can properly seek the benefit of whatever contributions can be made by an agency whose 'area of specialization' embraces problems similar to or intermeshed with those presented to the court."

The Court finds guidance in the *Wheelabrator* approach, and agrees with defendants and defendant-intervenor NCTSI that substantial consideration and great weight should be given to the Commission's findings and conclusions because it is an agency "with special competence in the field". The final determination of whether these contracts constitute the procurement of personal services proscribed by the personnel laws, however, rests with the Court.

A. *APPLICATION OF THE PELLERZI STANDARDS*

The basic criteria for determination of whether an employer-employee relationship exists between an individual and the Federal government are set forth in 5 U.S.C. § 2105(a).[8] The six Pellerzi Elements, in turn, relate pri-

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[8] 5 U.S.C. § 2105(a) provides:

"(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is—

(1) appointed in the civil service by one of the following acting in an official capacity—

(A) the President;

(B) a Member or Members of Contress, or the Congress;

(C) a member of a uniformed service;

(D) an individual who is an employee under this section;

marily to the third of these statutory criteria. In this regard, the Pellerzi analysis of the two representative NASA support service contracts begins by stating at page 22:

> "[T]his criterion embodies the same considerations as the common law test of control of a servant. * * * It is the right or power to control the individual in the performance of his work and the manner in which the work is done that is usually decisive."

Following a discussion of various provisions of the representative contracts and a brief review of the operations thereunder, General Counsel Pellerzi concluded that the contractor supervisors were merely *pro forma* supervisors. The inquiry, however, went further, there being "other factors relevant to whether the power of direction and control exists and is exercised by Federal officials over the contractor's personnel."[9] Those factors help make-up the Pellerzi Elements which are not to be mechanically applied. Contracts under review are to be realistically viewed, both by their terms and operation.

B. *THE REQUIREMENT THAT ALL SIX PELLERZI ELEMENTS BE PRESENT*

When reviewing the contracts at issue herein, the Commission applied a test requiring that all six elements be present, each to a substantial degree. There is apparently

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(E) the head of a Government controlled corporation; or

(F) the adjutant general designated by the Secretary concerned under section 709(c) of title 32, United States Code;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position."

[9] Pellerzi Opinion at 25.

no disagreement among the parties as to the "substantial degree" requirement. Controversy has arisen, however, over whether all six elements *must* be present. The Pellerzi Opinion, in setting forth the elements, states at page 40:

> "[C]ontracts which, when realistically viewed contain all the following elements, each to any substantial degree, either in the terms of the contract, or in its performance, constitute the procurement of personal services proscribed by the personnel laws."

It is clear that contracts containing all six elements will bring about the proscribed employer-employee relationship. However, the Pellerzi Opinion, at page 21, also addresses the question of whether all six elements must be present.

> "The criteria must be realistically applied and the end-point determination reached on the basis of the overall substance of the contract operations. For the purpose of insuring compliance with the personnel laws we do not believe it possible to refine the criteria or weigh their elements in application so as to indicate that mere changes in form or terminology will meet the substance of the Commission's objections. If, in substantial effect, the contract results in a form of personnel procurement not expressly authorized by law, it is proscribed by the personnel laws."

The Mondello Supplement further clarifies the correct approach by first recalling the relationship between the Pellerzi Standards and 5 U.S.C. § 2105(a), and then correctly stating:

> "The absence of any one or a number of [the six Pellerzi Elements] would not mean that supervision does not exist but only that there is less likelihood of its existence. Moreover, any single element may not be significant unless its presence is felt to a substantial degree."

The Court concludes that when read in context, and with the aid of the Mondello Supplement, all six elements need not be present for a finding that the proscribed relationship exists.

C. *THE PARTICULAR ELEMENTS CHALLENGED*

With respect to the sixth (and for purposes of this case, the most critical) Pellerzi Element, the Commission applied a test requiring "relatively continuous, close supervision [by Federal officials] of a substantial number of contractor employees." Plaintiffs contend the correct test requires only a showing that "the inherent nature of the service, or the manner in which it is provided, reasonably requires, directly or indirectly, federal direction or supervision of contractor employees."

The sixth Pellerzi Element is as follows:

> "The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order:
>
> —To adequately protect the Government's interest or
>
> —To retain control of the function involved, or
>
> —To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee."

The Mondello Supplement provides the following clarification:

> "[The sixth element] which involves a requirement for close supervision of contractor employees by Government employees for the protection of Government interest and functions is a companion piece to Bureau of the Budget Circular A-76 which requires agencies to perform for themselves those basic functions of management which they must perform in order to retain essential control over the direction of their programs."

"Close supervision", as it relates to the sixth element, is a test to be applied in the context of the Government's interest in maintaining necessary control over the direction of its programs. Moreover, it is clear that "close supervision" can be either "direct or indirect". However, the inclusion of the word "continuous' in the test actually applied by the Commission is troublesome. The Court can find no support in the Pellerzi Opinion for such a requirement. The Mondello Supplement, in referring to the fifth [10] element, does state:

> "The criterion stated in the fifth element is the continuing character of the Government need being met by the contract service. The suggestion that a need for service which lasts beyond a year must be filled by use of civil service personnel does not mean that contracts for briefer periods are invariably permissible. A contract for services to fill a temporary need of 30-60 days duration, but which involves continuous supervision of contractor employees by Government employees would be proscribed."

"Continuous supervision"; in context, relates to those short-term or temporary contracts which are not to be disregarded.

To support the inclusion of "continuous supervision" in the Commission's application of the sixth element, defendants assert that the sixth element is an integral part of the fifth. Defendant-intervenor NCTSI refers the Court to the following passage at page 2 in the Mondello Supplement:

> "For example, sporadic, unauthorized supervision over an occasional one of a much greater number of

[10] Emphasis added.

> contractor employees might reasonably be ignored; whereas, relatively continuous supervision of a substantial number of contractor employees by Government employees would have to be taken into account."

That passage, however, was included to explain the meaning of "presence felt to a substantial degree", and not for the purpose of formulating the restrictive test applied by the Commission upon the recommendations and interpretations of counsel. The Court is therefore of the opinion that the Commission incorrectly applied the sixth element of the Pellerzi Standards, and that the test urged by plaintiffs would result in the correct application of that element.

The Commission's application of the first element, Performance On-Site, the second, Government Furnished Equipment, and the third, Services Applied Directly to the Integral Effort of the Mission, have also been attacked by plaintiffs, and justified by defendants and defendant-intervenor NCTSI. Those contentions, being more factually related, are considered in Parts III and IV of this Opinion.

Plaintiffs' challenges to the Commission's application of the Pellerzi Standards, and its conclusions as to the nonexistence of the proscribed employer-employee relationship under each of the support service contracts reviewed, have persuaded the Court that further analysis must be undertaken. That analysis, however, will be limited to a review of the conclusions reached as to each contract.

III. *SUPPORT SERVICE CONTRACTS AT THE MARSHALL CENTER*

The support service contracts at the Marshall Center are what are commonly referred to as "non-specific contracts", that is, cost-reimbursement, level-of-effort type contracts, expressed in manhours and activated by means of Schedule

Orders [11] issued by an appointed Responsible Official, usually the Director of the Marshall Center function receiving the support services. The Responsible Official is charged with day-to-day administration and technical direction of the contract. The Schedule Order is implemented and coordinated by a government Technical Representative through specific Technical Directives. Often, Technical Monitors are designated to monitor and assist in evaluating specific Technical Directives. "Work Order Requests" directing work to be performed on a specific task as requested by the "user" or "customer" are subject to approval by the Technical Representative.

Generally, the early contracts, *i.e.*, those prior to 1971, are strikingly similar to those found objectionable by the Pellerzi Opinion. In its Summary Report, the Commission observed that the early contracts consistently contained articles, clauses and language greatly restricting Contractor control. Examples of such restrictions include requiring detailed Contractor reporting; prior approval by the Contracting Officer of staffing plans, and of policies and procedures relating to such items as wages, benefits and persoonel guidelines; and prior approval of diversion of key personnel.

The follow-on contracts provide substantially the same support services, performed by many of the same employees working under the same basic operations structure. Both the late replacement and follow-on contracts deleted many of the restrictions found objectionable by the Pellerzi Opinion, although in some instances the same objectives were achieved by incorporating the same language in the

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[11] A Schedule Order is a written authorization to the Contractor to perform certain work. It generally provides allotment for manhours and money, establishes deadlines for completion of work, material, overtime, and travel costs. The authorization may be changed from time to time by amendments to the Schedule Order and may also be supplemented by Technical Directives prepared by the Technical Representatives.

"Request for Proposal" (RFP). Additionally, the Marshall Center began to segregate work areas located on-site by constructing partitions; to move certain contractors off-site; and to modify contract language in an attempt to eliminate any connotation implying an employer-employee relationship.[12]

Plaintiffs contend that the contracts at issue herein are substantially identical in form, substance and operation to those ruled illegal in the Pellerzi Opinion, and that upon correct application of the Pellerzi Standards, this Court's conclusion must be the same. Defendants and defendant-intervenor NCTSI take the position that the contract restrictions are merely elements of contract administration necessary for control in cost reimbursement type contracts such as these; and, that, in any event, the corrective actions previously taken by the Marshall Center have cured any questionable features of the support service contracts.

A. *CONTRACTS IN WHICH ONLY PELLERZI ELEMENT 6 WAS FOUND NOT PRESENT*

For purposes of contract-by-contract analysis, the Court turns first to those 17 contracts in which the Commission found all the Pellerzi Elements present except the sixth element, Government Supervision at the Marshall Center.

1. Contract No. NAS 8-20166 with the Brown Engineering Company was effective May 4, 1965 to May 2, 1970, under which Brown provided technical support services in engineering and operation of facilities to the Marshall Center's Research Projects Laboratory. The contract contained the typical administrative and control provisions outlined above, including the more restrictive provisions common to the early contracts. When the contract was phased-out in 1970, on-site work formerly done by Contractor employees was absorbed by Civil Service employees.

[12] In the Summary Report, the Commission expressed the opinion that these actions were part of a campaign to "clean-up" support service contracts generated in part by the Pellerzi Opinion.

The Commission found that

> "the contract language is carefully couched so as not to imply supervision over the work of contractor employees by Civil Service personnel, [but that], when one looks behind the words to how the contract actually seems to have been administered, the contractor was told what to do, when to do it, how it was to be done, the qualifications requirements for his key people, how and when to report on his activities, etc." [13]

It further noted authority for overall responsibility of the performance of the Research Projects Laboratory was vested in its Director, and that "to retain full personal responsibility for the functions of the Laboratory * * * assigned to him, some degree of direction or supervision of contractor employees (directly or indirectly) is reasonably required".[14] Such supervision was exercised through use of Contractor reports, control of where work could be performed and of workhours on-site, and the Article XIV in-depth requirements for Contracting Officer prior approval of numerous personnel activities.

2. Contract No. NAS 8-20070 was with Vitro Services Division of Vitro Corporation of America. It was effective from March 16, 1965 through July 31, 1971 and provided engineering, operation of facilities and fabrication support services to the Marshall Center Test Laboratory. Although similar support services continued to be supplied by other Contractors, much of the work performed under this particular contract was taken over by Civil Service employees. The typical administrative and control provisions found in the early contracts were included.

[13] Report On: Brown Engineering Company, Inc. Contract No. NAS 8-20166, by the U. S. Civil Service Commission, May, 1974, at pages 21-22.

[14] *Id.*, at 24-25.

In its report on NAS 8-20070, the Commission itemized numerous elements of control and direction taken from various sections of the contract and relating to: detailed reporting and record keeping, key personnel, over-time approval, transmission and execution of the Contracting Officer's directions and instructions, working hours, inspection procedures, work and workmanship levels of performance, prior approval of labor rates and salaries (for both direct and indirect labor), and prior approval of personnel policies and procedures. Additionally, the contract provided for (1) phase-in phase-out services, (2) Contracting Officer review of personnel resumes of all Contractor employees whose salaries were charged as direct labor, and (3) government or successor Contractor interviews with Vitro Services employees for future employment purposes.

The Commission noted that

> "[n]o provision is made in the contract for redelegating the responsibility of the responsible official [and] [i]mplicit in the retention of full personal responsibility is the capacity to establish the standards of performance and to determine that satisfactory performance has been achieved." [15]

It further found that "according to the terms of the contract the government does establish standards of performance and the government ultimately decided whether or not work had been accomplished in a satisfactory manner." [16]

3. Technical support services were provided to the Quality and Reliability Assurance Laboratory at the Marshall Center by SPACO, Inc. under contract No. NAS 8-20081 from April 1, 1965 to August 20, 1971. The contract Ap-

[15] Report On: Vitro Services Disision [*sic*] of Vitro Corporation of America Contract No. NAS 8-20070, by the U. S. Civil Service Commission, May, 1974, at pages 22-23.

[16] *Id.*, at 23.

pendices indicate the services included support to the NASA training school; maintenance and installation of electrical equipment; stage and ground support equipment checkout station schematics; work order scheduling and fabrication coordination; engineering and design support; checkout data acquisition and instrumentation; quality engineering analysis, evaluation, calibration and environmental testing; engineering support for design, development, test, documentation preparation, reliability and related tasks; part program and engineering support; fabrication and related services; and parts reliability information center.

The SPACO contract contained both the basic and the more restrictive control provisions, with additional controls imposed depending upon the particular function being supported. The "Charter"—or functional statement—for the Quality and Reliability Assurance Laboratory states the Laboratory is "to establish, *supervise* and maintain a comprehensive quality and reliability assurance program",[17] the responsibility resting with the Director.

Since the support services corresponded to established Laboratory functions, the Commission's view was that there was a presumption "that these services were performed under guidance, supervision, and direction of the heads of [Laboratory] offices." [18] The report supports this presumption by citing examples of position descriptions charging civil service employees with responsibility for direction, control, coordination, integration, approval, *etc.* in support of the particular Laboratory function.

[17] Report on SPACO, Inc. Contract No. NAS 8-20081, by the U. S. Civil Service Commission, May, 1974, at pages 12-13 (emphasis in original).

[18] *Id.*, at 13.

Civil Service employees, however, were prohibited from directly assigning work to contractor employees, as noted by the Commission:

> "To avoid the appearance of employer-employee relationship between MSFC personnel and contractor personnel a paper system was established so that controls, such as, manhouse and dollar limitations, deadline dates, priorities, and work instructions (authorization to perform specific work) could be passed in writing from a civil service supervisor to a contractor supervisor. Moreover, in order to implement this paper process a network of civil service supervisors, called Appendix Monitors, Technical Representatives, Task Monitors, etc., had to be established." [19]

4. Technical support services were provided to the Quality and Reliability Assurance Laboratory at the Marshall Center from August 1, 1971 to April 15, 1974 under Contract No. NAS 8-21806 with Federal Electric Corporation.[20] Generally, the services are classified as within the technical and engineering category, encompassing tasks ranging from vehicle checkout station preliminary design to review and evaluation of the overall Marshall Center Quality and Reliability program.

The contract contained the typical day-to-day administration and technical direction provisions, was implemented by issuance of Schedule Orders, and required observance of government regulations, standards of personnel competency, and substantial record keeping. The Responsible

[19] *Id.*, at 18-19.

[20] Contract No. NAS 8-21806 was a follow-on to Contract No. NAS 8-20412, also with Federal Electric, which is discussed *infra* at pages 43-45, because NAS 8-20412 presents additional questions relating to Pellerzi Element 1, On-Site Performance and Element 2, Government Furnished Equipment.

Official's letter of appointment provided for additional controls, such as monitoring technical aspects of the work, interpretation of data and technical portions of the contract Scope of Work, clarification of requirements, establishment of priorities and work sequence, approval of Contractor travel, authorization of overtime and the appointment of Technical Monitors as necessary.

Similarly, the letters of appointment to Technical Representatives authorize them to

> "appoint Technical Monitors as necessary to provide operational assistance and support; prepare and issue supplementary Technical Directors to provide more specific details for work covered by the Schedule Order; provide necessary direction on technical portions of the contract Scope of Work; clarify requirements and otherwise assist the contractor to understand the nature and extent of the work assigned; establish priorities and sequence of work; and through his monitors, provide continued surveillance of the contractor in his area and prepare and submit monthly evaluation reports to the Technical Evaluation Coordinator." [21]

A substantial number of high level Government Officials were thus authorized to, and did, establish the Contractor controls noted above.

5. Contract No. NAS 8-20073, effective April 1, 1965 to July 31, 1971 with Brown Engineering Company provided technical support services to the Propulsion and Vehicle Engineering Laboratory at the Marshall Center. More specifically, Brown Engineering supplied conceptual and preliminary design studies, vehicle systems engineering,

[21] Report on: Federal Electric Corporation Contract No. NAS 8-21806, by the U. S. Civil Service Commission, May, 1974 at pages 19-20.

structural research and development, systems, sub-systems and component testing, propulsion and mechanical systems research and development, materials research and development, program coordination, engineering and documentation and fabrication. It was a typical manhour level-of-effort contract containing both the basic operational administrative provisions as well as the more restrictive terms found in the early contracts.

The follow-on is current[22] Contract No. NAS 8-21804, also with Brown Engineering Company, effective August 1, 1971 through July 31, 1974. Essentially the same services were performed under this contract as under NAS 8-20073, and the same basic operational structure was utilized. The report for NAS 8-20073 states:

> "Note: This contract is identical, in every essential detail, to contract NAS 8-21804 currently in force * * *. Therefore, the write-up for NAS 8-21804 will apply to this contract as well, except where noted."[23]

Pertinent to this analysis is the statement that the NAS 8-20073 "contract terms were more restrictive with respect to the contractor, than is the present contract."[24] Staffing Plan requirements and prior approval thereof, and prior approval of key personnel diversion were cited as examples of the more restrictive nature of the earlier contract.

The Commission found "[t]he terms of the contract and the manner in which the service is performed has [*sic*]

[22] For purposes of continuity, those contracts in force at the time of the Commission's investigation are hereinafter referred to as "current" or "currently in effect" although some of the contracts may no longer be in effect.

[23] Report on: Brown Engineering Company, Inc. Contract No. 8-20073, by the U. S. Civil Service Commission, May, 1974, at page 5.

[24] *Id.*, at 11.

been carefully programmed to avoid the appearance of direct supervision by civil service personnel over contractor employees or vice versa."[25] However, the Commission also opinioned that notwithstanding the apparent lack of direct supervision, it was necessary to

> "take notice of the machinery and procedures set up to transfer work from Government Sources where it originates to the contractor work force where it is performed and back to the Government."[26]

An extensive review of the elaborate paper process network by which the Contractor is instructed as to the work to be done was then undertaken.

6. Contract No. NAS 8-18405 with Computer Sciences Corporation, effective from July 1, 1966 to July 31, 1971, supplied technical support services to the Computation Laboratory. Specific areas receiving support services were identified in the Appendices as the Resources Management, Data Systems Engineering and Special Projects Offices; and the Digital Projects, Data Reduction, Simulation, Engineering Systems and Industrial Systems Branches. It was a manhour, level-of-effort contract activated by Schedule Orders, supplemented by Technical Directives, and, occasionally, by verbal directives arising during meetings. The contract contained the more restrictive early contract reporting, policies and procedures, personnel, hours of work and overtime provisions. All work instructions were passed on to Contractor management by Civil Service personnel.

The Commission summarized the Government monitor network as follows:

> 'Thus, through a 50+ 'Government Monitor' network, which is a ratio to the contractor work force of 1:10, a

[25] Report on: Brown Engineering Company Contract No. NAS 8-21804, by the U. S. Civil Service Commission, May, 1974, at page 17.

[26] *Id.*, at 17-18

> work request is prepared by the customer; analyzed by the civil service monitor to determine manhours, cost and time; further analyzed by the contractor supervisor; returned to civil service for approval for performance. In the process, 'coordinating' meetings were held to clarify requirements, resolve problems, etc. Once the work was in process, it was 'monitored' by civil service personnel from start to finished product." [27]

The Commission also observed at page 32 of the Report that:

> "[T]he agency's instructions, as well as local instructions from MSFC, caution Government officials to guard against establishing employer-employee relationships. As a result, contractor employees occupy separate quarters, plainly marked with their own signs, and elaborate system for transmitting work instructions by written directives and monitoring the work through a network of quasi-supervisors has been set up to avoid direct day-to-day supervision by Government employees over contractor employees."

Current contract No. 8-21805, effective August 1, 1971 through July 31, 1974, also with Computer Sciences Corporation is a follow-on to NAS 8-18405 providing essentially the same support services. Although the more restrictive contract provisions were eliminated from NAS 8-21805, the work procedures are largely unchanged.

The Commission prepared a full report on NAS 8-21805, finding that while no instances of direct supervision were noted,

> "an elaborate machinery set up by the contract gives mangement effective control over the contractor by

[27] Report on: Computer Sciences Corporation Contract No. NAS 8-18405, by the U. S. Civil Service Commission, May, 1974, at page 29.

> stipulating what is to be done * * *, when, and in what manner; by specifying proficiency levels for contractor employees; by requiring a staffing plan; by setting man-hours; and by evaluating each technical directive." [28]

Approximately 77 civil service employees in the Computation Laboratory were identified as being involved in some phase of the management, supervision, monitoring or review of NAS 8-21805.

7. Current contract No. NAS 8-21809, effective August 1, 1971 through April 15, 1974, is a follow-on to No. NAS 8-20083, effective March 16, 1965 to July 31, 1971. Both are with Hayes International Corporation providing technical support services to the Marshall Center Product Engineering and Process Technology Laboratory, and include essentially the same work functions, namely: Tool and Equipment Engineering, including mechanical tool modification and maintenance, plat engineering design support, and tool and equipment design for experimental research projects and phototype vehicles; Program support consisting of data processing and program tool and component warehousing; Documentation Control including documentation processing and engineering configuration control services; and Research and Process Technology consisting of applied research in welding development, experimental and applied research in electrical/electro-mechanical development, and methods research and development. Material Handling of Critical Hardware was added to the current contract by modification in January, 1973.

These two contracts are analyzed together inasmuch as "[t]he report with respect to the current contract, i.e.,

[28] Report on: Computer Sciences Corporation Contract No. NAS 8-21805, by the U. S. Civil Service Commission, May, 1974, at pages 19-20.

NAS 8-21809, is applicable to this contract." [29] Both contracts were activated by Schedule Orders and Technical Directives. Similarities were found by the Commission in the suggested minimum capabilities required in the RFP for NAS 8-21809 and the minimum capabilities required for employees under NAS 8-20083. Additionally, NAS 8-20083 contained the more restrictive provisions common to early NASA contracts such as: detailed reporting requirements, significant controls on Contractor employees by the Government Contracting Officer including approval of an initial staffing plan and consent before diversion of key personnel, and prior approval of the Contractor's policies and procedures plan affecting personnel qualifications, salaries, wages and administration.

Parallel Civil Service forces were engaged in functions similar to those of Contractor employees to the extent that the Commission found that "much of the work is performed by either work force depending upon capability, workload, and coordination factors." [30] The contracts themselves and the manner of performance thereunder, however, are "carefully programmed to avoid the appearance of direct supervision over contractor employees." [31]

> Government supervisors were found to
>
> "(1) Describe and define the work to be done in writing and in discussion with contractor supervisor; (2) Specify the number of manhours and the amount of money allotted for each function; (3) Specify materials to be used; (4) Approve overtime and travel; (5) Establish deadlines for the contractor's performance during and upon completion of each work assignment." [32]

[29] Report on: Hayes International Corporation Contract No. NAS 20083, by the U. S. Civil Service Commission, May, 1974 at page 11.

[30] Report on: Hayes International Corporation Contract No. NAS 8-21809, by the U. S. Civil Service Commission, May, 1974 at page 18.

[31] *Id.*, at 30

Many of the Contractor employees have been working continuously at the Marshall Center under these two contracts since 1965. In summarizing its findings with respect to Pellerzi Element 6, the Commission investigators stated:

> "Government supervisors outnumber contractor supervisors and the Government influences the number and kinds of positions, initial selection of employees, directs increases or decreases in contractor work force, controls the number of manhours, money, travel, and overtime, and the kinds of material used." [33]

8. Contract No. NAS 8-20055, effective March 1, 1965 through July 31, 1971, and the current follow-on, Contract No. NAS 8-21812, effective August 1, 1971 through July 31, 1974, both with Sperry Rand Corporation, provide for technical support services to the Astrionics Laboratory at the Marshall Center. The Scope of Work involves a wide variety of research, design and documentation, component evaluation and testing.

The typical administrative and control provisions are present in both. The earlier contract, NAS 8-20055, also imposes additional controls, *e.g.*, detailed reporting requirements, permission to the Government or a successor Contractor to hire employees upon expiration or termination of the contract, prior approval of a staffing plan, personnel policies, and diversion of key personnel by the Contracting Officer.

Both contracts were activated by Schedule Orders. Technical Directives are issued and discussed between the Contractor and NASA technical people, and joint technical

[32] *Id.* at 38.

[33] *Id.* at 41.

meetings held frequently. The Commission found that the policy behind the operational process

> "is to prevent employer-employee relationship by prohibiting work assignments being made directly to contractor personnel and interim direction and control of such work by Government Representatives, except as between the Government's and the Contractor's supervisors." [34]

Thus, a paper process and supervisor-to-supervisor relationship has been developed under both contracts to avoid direct work assignment to, and supervision over, Contract employees.

With regard to NAS 8-21812, the Commission commented that

> "the Government (MSFC) controls the number of personnel employed under the contract, kind and volume of work assigned to the contractor, priorities, sequence and time schedules for accomplishing the work, the quality of work products, as well as overtime or travel necessary in performance of work under the contract." [35]

Substantially the same conclusions were reached as to NAS 8-20055.

9. Contract No. NAS 8-14109, effective April 1, 1965 to May 31, 1971, was with Management Services Incorporated of Tennessee. Its purpose was to provide technical support services to the Technical Services Offices at the Marshall Center, more specifically defined in Appendices A through

[34] Report on: Sperry Rand Corporation Contract No. NAS 8-20055, by the U. S. Civil Service Commission, May, 1974, at page 12. *See also*, Report on: Sperry Rand Corporation Contract No. NAS 8-21812, by the U. S. Civil Service Commission, May, 1974 at page 22.

[35] Report on Contract No. NAS 8-21812, *supra*, at 22-23.

G to the contract as including vehicle support services; photographic support; maintenance and repair of instrumentation, research, electronic, and mechanical laboratory equipment; chemical, hydraulic and ultrasonic purging; miscellaneous crafts; grounds and landscape maintenance; and logistic support. The Responsible Official, the Director of the Technical Services Office, activated the work by issuing Schedule Orders. The contract contained both the general and the more restrictive control provisions discussed *supra*.

The Commission's investigators reported that "[e]lements of control and supervision are apparent in several sections of the contract",[36] and pointed to Article XIV (requiring final approval by the Contracting Officer of a comprehensive Staffing Plan and Implementation of Services, and prior approval of changes in key personnel, and labor rates and salaries (both for direct and indirect labor)); Article XV—Key Personnel Positions; Article XXIII—Wage Plan Approval; and the detailed Scope of Work Appendices. It concluded that "[i]n terms of [NAS 8-14109] the government does exercise a sizeable degree of supervisor direction." [37]

Current contract Nos. NAS 8-21769 and NAS 8-21771, both effective June 1, 1971 through May 31, 1974, and both with Management Services Incorporated of Tennessee, are follow-on contracts to NAS 8-14109 providing essentially the same support services.

As to NAS 8-21769, the Commission investigators identified and discussed 26 different areas in which "[e]le-

[36] Report on: Management Services, Incorporated of Tennessee Contract No. NAS 8-14109, by the U. S. Civil Service Commission, May, 1974, at page 21.

[37] *Id.*, at 36. This report offers little discussion of the methods of operation under NAS 8-14109. However, the affidavits attached as Exhibits to the Report indicate the process was not unlike that used in other Marshall Center offices.

ments of supervision and control are apparent in * * * the contract." [38] In terms of actual performance, it found and detailed evidence of government supervision and control. particularly with respect to (1) the assignment of work, (2) required Contractor reporting, and (3) the official and actual duties of Civil Service personnel in the Technical Service Office.

The services provided under NAS 8-21771 are further specified in Appendix A to the contract as: operating and maintaining one Gruman Gulfstream, one G-47, and one Beechcraft Queenaire type aircraft; providing food service and refreshments on flights; and servicing transient aircraft. The Commission found a "number of indicators, both in the terms of the contract and in the actual direction of the contractor." [39] Specific examples of how three high level Marshall Center officials are involved in the day-to-day administration of the contract were reported. The Commission then summarized its findings as follows:

> "[I]n view of the existence of an Air Operations Branch manned by civil service personnel and headed by a Supervisory Aircraft Pilot with supervisory duties and responsibilities over contractor operations set out in his official position description; the roles of the Director, Technical Services Office and Chief, Transportation Division; the System of Schedule Orders, Technical Directives and Task Orders; the many and frequent reports required of the Contractor; the designation of key personnel and qualification requirements; and the NASA Air Operations Manual, it is determined that the Government does exercise direction over the contractor. However, this does not extend to direct supervision of the contractor's employees." [40]

[38] Report on: Management Services Incorporated of Tennessee Contract No. NAS 8-21769, by the U. S. Civil Service Commission, May, 1974, at page 19.

[39] Report on: Management Services Incorporated of Tennessee Contract No. NAS 8-21771, by the U. S. Civil Service Commission, May, 1974, at page 9.

10. Contract No. NAS 8-21642, effective April 1, 1970 through May 31, 1973, with SysteMed Corporation,[41] and its follow-on, current Contract No. NAS 8-28469, effective June 1, 1973 through May 31, 1974, with the Kelsey Seybold Clinic are considered together since

> "the SysteMed Corporation contract was essentially the same operation performed by essentially the same staff as the present Kelsey-Seybold Clinic * * *, the contract terms are very similar—the conclusions reached in the Kelsey Seybold Clinic contracts are applicable." [42]

The medical program support services include emergency and initial treatment, and first aid for illnesses and injuries to Marshall Center employees, Contractor employees and Center visitors; periodic physical examinations of all Marshall Center employees, including laboratory tests and X-rays; special monitoring physical examinations for Civil Service and selected Contractor personnel; and the identification, evaluation and control of health hazards.

The contracts contain the typical provisions for Schedule Orders, a Responsible Official, *etc.*, and "[t]he language of the printed contract[s] and the manner of performance thereunder is carefully programmed to avoid the appear-

[40] *Id.*, at 13.

[41] Services contracted for under NAS 8-21642 had previously been supplied under NAS 8-14110, Appendix L, by RCA Service Company. NAS 8-14110 is considered *infra* at 45-52.

[42] Report On: SysteMed Corporation Contract No. NAS 8-21642, by the U. S. Civil Service Commission, May, 1974, at page 7.

ance of direct supervision over contractor employees."[43] The more restrictive provisions common to the early contracts have been transferred from the contracts themselves to the RFP which requires submission of data relating to the number and kinds of positions, detailed personnel qualifications and experience data, and qualifying policies and procedures. As to these requirements, the Commission concluded that the Government was in a position to, and did actually,

> "direct, influence or control (1) the number and kinds of positions; (2) qualifications required of the persons to be employed [including the personnel selected for key positions]; (3) the sources from which employees were to be hired; and (4) the organization of the contractor's work force."[44]

Additionally, the Commission found substantial policy direction contained in the government's rather specifically written manuals and "Management Instructions". Reporting requirements and contract performance evaluation plans were also cited as indicia of government direction. The Commission concluded that:

> "Although there is no direct supervision by Government personnel over contractor employee except through the established 'Government supervisor'—'contract supervisor' channels—the Government does control and influence the contractor operation in a number of ways, including the number and kind of positions, qualification requirements, selection of key personnel. In addition, the Government has issued certain program and management directives which are binding on the Medical Director. The Medical Director

[43] Report on: Kelsey-Seybold Clinic Contract No. NAS 8-28469, by the U. S. Civil Service Commission, May, 1974, at page 24.

[44] *Id.*, at 29.

> attends weekly meetings, annual conferences, makes monthly reports, and is evaluated by Government officials.
>
> " * * * In short, the Medical Center at MSFC is Government controlled and directed. But direct supervision of contractor employees is not present."[45]

B. Conclusions as to Contracts in Which Only Pellerzi Element 6 Was Found Not Present

In each of these 17 contracts, the Commission concluded that all Pellerzi Elements were present except the sixth—Government Supervision. As to that element, this Court found *supra* at page 15 that the test which should have been applied is one which necessitates a showing that the inherent nature of the services, or the manner in which they are provided, reasonably requires, *directly or indirectly*,[46] federal direction or supervision of contractor employees.

Moreover, "[t]he c 'teria must be realistically applied and the end-point determination reached on the basis of the over-all substance of the contract operations."[47] This realistic approach extends both to the terms of the contract, as well as the method of performance thereunder. In this regard, the Court finds that the early contracts are basically standard in form and essentially identical to those reviewed in the Pellerzi Opinion. The more restrictive and objectionable provisions have either been eliminated from the current contracts entirely, or incorporated into the Request for Proposal. Significantly, however, and as the Commission found, the manner of operation under the current contracts has remained largely unchanged.

[45] *Id.*, at 41.

[46] Emphasis Added.

[47] Pellerzi Opinion at 21.

When properly applied the sixth Pellerzi Element was, and is, present to a substantial degree in each of the 17 contracts analyzed above. Accordingly, notwithstanding attempts to program the contracts to avoid the appearance of an employer-employee relationship between NASA and Contractor non-civil service employees, this Court concludes that each of the 17 contracts reviewed above establishes the proscribed relationship, and therefore was, and is, null and void.

C. Contracts in Which All Pellerzi Elements Except 1 and 6 Were Found Present

The Court turns next to the three contracts which the Commission found all Pellerzi Elements present except the first element, Performance On-Site, and the sixth element, Government Supervision. Regarding the first element, the Pellerzi Opinion states at page 27:

> "'If the work is done upon the premises of the employer * * * the inference is strong that such workmen are the servants of the owner * * *,' *Restatement, Second Agency*, § 220. Comment on Subsection 2(e)."[48]

The Mondello Supplement, at page 2, states further:

> "The first four elements simply restate common experiences. Performance of the contract work by contractor employees on Government premises ordinarily facilitates supervision by Government employees."

Proper application of the sixth element, has, of course, already been thoroughly reviewed.

1. Contract Nos. 8-20082, effective March 16, 1965 through July 31, 1971 and its follow-on, NAS 8-21810, effective August 1, 1971 through July 31, 1974, both with Northrop Services, Inc., are considered together. The Commission determined that NAS 8-20082 was essentially the same in its operation as the current contract, and that the conclusions reached were also the same. Both contracts provide for support services to the Aero-Astrodynamics Laboratory at the Marshall Center including operation of one aerodynamic testing facility, one atmospheric research facility, and engineering support in the following areas: aerodynamics, thermodynamics, astrodynamics and guidance theory, dynamics and control, aerospace environment, mission planning and light mechanics.

With respect to the first Pellerzi Element, the Commission found that the contracts are not performed on-site since the vast majority of the individuals performing work thereunder continue to be physically located at the company-owned facility in Huntsville Research Park and not at the Marshall Center. Technically, this conclusion is correct. However, the Court does note that the Commission also found that computer computational services provided by the Government on-site involved principal tools and equipment in the required performance of work under the contract.

As to the sixth Pellerzi Element, both contracts contain the general control clauses discussed *supra*. Examples of additional controls were pointed to in provisions requiring continuity of services, contractor reimbursement only upon approval of the Contracting Officer, personnel capable of performing in a manner acceptable to the Government, the retention of full personnel responsibilities by the Responsible Official for the function support in his office, and Government determination of what constitutes acceptable work. The Commission noted with respect to the sixth element:

> "While it is possible to maintain that the Government cannot force, in terms of directly ordering, the con-

[48] In the Opinion, this statement is actually made under the heading "Furnishings of office or working space". Pellerzi Elements 1 and 2, Government Furnished Equipment, are commonly found together and the analysis by necessity overlaps. Also see analysis of NAS 8-14108 and NAS 8-20412 *infra* at 41-45.

tractor to perform in accordance with standards set by the Government th[r]ough its option to renew the contract and through its evaluation-award for process, or through institution of default proceedings, does have a powerful tool with which to motivate the contractor to excellence (or at least satisfactory levels) of performance. The motivational factors are profit (award fee) and job (contract) retention." [49]

2. Under current Contract No. NAS 8-21811, Planning Research Corporation has provided support services to the Marshall Center's Systems/Products office since August 1, 1971. The services include preparation of technical specifications, system requirements, test verification requirements and plans, logistical plans, safety plans and study reports.

The Commission concluded the Performance On-Site element was not present since "on-site work has declined from eighteen percent in the first year of operation to zero percent in the current [1974] year." [50] The work is performed in Planning Research Corporation's offices in Huntsville, Alabama. The services provided were found to "represent an office-type operation and the office equipment furnished by the Government represents a substantial portion of the office equipment required." [51]

As to the Government Supervision element, the standard controls provisions are present in the contract's terms. The Commission found the Contractor Manager's statement of operations to be fairly descriptive:

[49] Report On: Northrop Services, Inc. Contract No. NAS 8-21810, by the U. S. Civil Service Commission, May, 1974, at pages 15-16.

[50] Report On: Planning Research Corporation Contract No. NAS 8-21811, by the U. S. Civil Service Commission, May, 1974, at page 4.

[51] *Id.*, at 5.

"The Government provides manhour and cost estimates which control the number of employees and the cost of operation; work is received in the form of a written directive; progress of work and/or problems may be discussed between contractor task personnel and civil service personnel; and if any changes are made in directions, approval must first be obtained from the Office of the Responsible Official." [52]

The Responsible Official controls work "by the issuance of schedule orders, supplemented by technical directives and monitored by technical representatives. He controls the money, manhours, establishes priorities and sequence of work, approves travel, authorized overtime, resolves technical problems and evaluates contractor performance." [53] Additional controls, generally of the monitoring and evaluation category, are exercised by the Civil Service support staff.

The Comission report summarizes the investigation as to the sixth Pellerzi Element as follows:

"Direct supervision by civil service personnel over contractor personnel or vice versa is known by both sides, i.e., contractor and civil service, to be improper, and the paper and procedural processes are set up to avoid this. Controls are exercised through supervisors on both sides. The Responsible Official is still held responsible and accountable for the functions assigned to his office—Whether accomplished by the civil service work force or the contractor work force—both under his direction. From a practical standpoint there is virtually no difference in the manner in which his direction over the two work forces is exercised. In both instances the Responsible Official gets the job done by assigned subordinate supervisors. He doesn't directly

[52] *Id.*, at 11.

[53] *Id.*, at 13.

supervise employees on either side. The Contractor Manager in this instance is not different, as far as the day to day work is concerned, from a Division Chief or Branch Chief." [54]

The Court is of the opinion that neither the Northrop contracts nor the Planning Research Corporation contract are substantially different, either by the contract terms or the manner of operation thereunder, than those contract found *supra* to have established a relationship tantamount to that of employer-employee. When realistically viewed, the inherent nature of these services, as well as the manner in which they are provided, does require, directly or indirectly, Government Supervision and Control over the Contractor's employees. The sixth Pellerzi Element, when properly applied, is present to a substantial degree. And while the work is technically performed off-site, that element, as it exists in these three contracts, is not, standing alone, sufficient to foreclose the conclusion that the prohibited employer-employee relationship did not previously, and does not now, continue to exist. The Court therefore concludes that these three contracts were, and are, null and void.

D. *CONTRACTS FOUND TO CONTAIN ALL PELLERZI ELEMENTS EXCEPT 1, 2 AND 6*

Two contracts were found by the Commission to contain only three of the Pellerzi Elements. It concluded that the first element, Performance On-Site, the second element, Government Furnished Equipment, and the sixth element, Government Supervision, were not present.

Since proper application of the first and sixth elements has been reviewed *supra,* the Court turns directly to consideration of the second element, Government Furnished Equipment. The Pellerzi Opinion discusses this element in

[54] *Id.,* at 15.

the context of a task assignment of such a highly specialized nature that it would be impossible for the Contractor to supply the necessary equipment.[55] Again quoting from the *Restatement, Second, Agency,* the Opinion, at page 26, sets forth the following view:

> "'[I]f the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is a master. This fact is, however, only of evidential value.' *Restatement, Second, Agency,* § 220. Comment on subsection (2)k."

The Mondello Supplement simply observes at page 2, that "[u]se by contractor employees of Government-furnished equipment creates the same facility for supervision, and warrants similar close inquiry."

1. Under the Rust Engineering Contract, NAS 8-14108, effective March 1, 1965 to January 13, 1969, technical support services identified in Appendix A as Engineering Design, in Appendix B as Master Planning, and in Appendix C as Construction Inspection of Facilities, were supplied to the Facilities and Design Office at the Marshall Center.

The Commission's conclusion as to Performance On-Site was based on the fact that 81% of the work was performed offsite, namely at the Contractor's plants in Huntsville. The Report on NAS 8-14108 also indicates that it was the Engineering Design and Master Planning work that was done off-site, while the Construction Inspection of Facilities work was performed on-site. The contract, provided, however, that the Rust Company was to be paid $3.75 per square foot by the Government for the office space utilized to perform the offsite work.

[55] In many instances, it would also be economically unwise for the Government to indirectly stand the cost through Contractor acquisition.

With respect to the second element, Government Furnished Equipment, the Contractor apparently supplied the principal tools and equipment for the work performed under Appendices A and B, although the contract did provide that the Government was obligated to provide "all computer and allied services required in the performance of the services covered by the contract."[56] Most of the equipment used for surveying was provided by the Government. However, because "[t]he Staffing Plan shows that the surveying activity (civil drafts (surveys)) to be a two man level of effort during the last in-force contract year of this contract,"[57] the Commission concluded that as to this activity, the second element was not present to a substantial degree.

As to the sixth element, NAS 8-14108 contained both the general and the more restrictive Government control provisions discussed in detail *supra*. It does not appear that the method of operation under this contract was much different than under the other early contracts reviewed above. The Commission found some 22 different provisions evidencing elements of Government control and direction imposed by the terms of the basic contract and its modifications. Additionally, it noted that no provision was made for re-delegating the Responsible Officer's day-to-day administration and technical direction responsibility, and that therefore the capacity to establish standards of performance and to determine that satisfactory performance had been achieved was implicit. The investigators concluded that "[i]t is apparent that according to the terms of the contract the Government does establish standards of performance and the Government ultimately decided whether or not work had been accomplished in a satisfactory manner",[58] but that supervision of contractor employees was not present to a substantial degree.

[56] Report On: The Rust Engineering Company Contract No. NAS 8-14108, by the U.S. Civil Service Commission, May, 1974, Exhibit A.

[57] *Id.*, at 6.

2. Contract No. NAS 8-20412, effective July 11, 1966 through July 31, 1971, with Federal Electric[59] provided support services to the Marshall Center Space Flight Center Reliability Program. The work supplied is described in general terms in Appendix 1 and the accompanying task statements as including "the review, evaluation and reoccmendation for corrective action with respect to other contractors as well as the MSFC and NASA reliability requirements."[60]

The contract was performed at the Contractor's facilities in Huntsville, Alabama as well as at other Contractors' plants in California. The Commission reported that

> "[s]ince the inspection and evaluation function could only be performed at the site where the work was being done (other contractor's plants), the conclusion is that this was not 'on site performance.' "[61]

With respect to Government Provided Equipment, the second Pellerzi Element, the Commission found that the Contractor furnished the necessary equipment and supplies for its staff of 130 professional workers for work being done in Huntsville, (although these expenses were apparently included in the cost plus award fee), but that at the

[58] *Id.*, at 21.

[59] NAS 8-20412 actually preceded Contract NAS 8-21806, also with Federal Electric. NAS 8-21806 is discussed *supra* at 21-23, because the only issue with respect to it concerned the presence of Government Supervision, and it was performed at the Marshall Center.

[60] Report On: Federal Electric Corporation Contract No. NAS 8-20412, by the U. S. Civil Service Commission, May, 1974, at page 2.

[61] *Id.*, at 4.

other locations, the government did supply equipment, materials and services. The Government was also obligated to furnish, at no cost to Federal Electric, all the necessary computer services.

In a preliminary statement as to its findings on the sixth Pellerzi Element, the Comission report states the

> "basic instruction used by the contractor employees in performing [review, evaluation and recommendation of corrective action services] emanated not from his employer of record, the Federal Electric Corporation, but from the Government employer, NASA." [62]

The Commission found facts indicative of Government direction and supervision in the inherent nature of the services as well as in the manner in which the services were provided. The contract contained both the general, and the more restrictive Government control provisions, and "counterpart supervisors" were extensively utilized. The contract required, *inter alia*, progress, final, fund, overtime usage, and other reports; Contractor employee hiring by Government or successor Contractors; prior submission of staffing plans for approval; prior approval of key personnel policies and procedures and overtime.

Contracts NAS 8-14108 and NAS 8-20412 must be realistically viewed. The Court concludes that when the proper test is applied, direct or indirect Government direction or supervision of these Contractors' employees was present in each case to a substantial degree, and that the requirements of the sixth Pellerzi Element are satisfied. The Court further concludes that although the facts adduced as to each contract indicate some level of Government involvement, the Commission correctly determined that the Performance On-Site and the Government Furnished Equipment elements were not present to a substantial degree. While the

[62] *Id.*, at 8.

likelihood of overall Government supervision is diminished by the absence of these two elements, Contracts NAS 8-14108 and NAS 8-20412 must still be held to have created a relationship between the Contractors' employees and the Government tantamount to that of employer-employee.

E. Contract Nos. NAS 8-14110 and 8-21808

The remaining two contracts investigated at the Marshall Center, NAS 8-14110 with RCA Service Company, effective April 1, 1965 through November 11, 1971, and its successor, current contract NAS 8-21808 with Hayes International Corporation, effective November 11, 1971 through November 30, 1974, are considered apart from the other contracts because of the issues raised by the Commission Reports.

The support services, itemized in Appendices A-M in NAS 8-14110, and Appendices A-I in NAS 8-21808, include the areas of telecommunications, reproduction, graphic arts and model design, technical publications, technical documentation repository, protective and custodial services, maintenance and repair of photographic equipment, safety engineering, refuse collection, laundry and medical services and technology utilization.[63]

Apparently because of the wide variety of services supplied under these contracts, the Commission investigators attempted to review and apply the Pellerzi Standards independently to each Appendix of NAS 8-21808. Without specifically adopting the Report on NAS 8-21808, the Commission noted in its Report on NAS 8-14110 that the testimony of Marshall Center personnel interviewed was "to

[63] Medical support services supplied under Appendix L to NAS 8-14110 were subsequently awarded to the SysteMed Corporation under NAS 8-21642. Its successor is NAS 8-28469 with the Kelsey Seybold Clinic. Both subsequent contracts are reviewed *supra* at 32-34.

the effect that there were no significant differences in operations under this contract and successor contracts—the terms of [NAS 8-14110 with RCA] are considerably more restrictive." [64]

Technical Publication support (which involved technical writing, editing and typing of scientific and technical reports, *etc.*, furnished to the Contractor in rough draft), Laundry and Refuse Collection services were correctly determined to be performed off-site, Pellerzi Element 1; the latter two services were also correctly found not to utilize principal tools and equipment furnished by the Government, Pellerzi Element 2.[65]

The Commission investigators concluded that the third Pellerzi Element, Integral Effort, was not present with regard to the Photo Repair, Custodial, Laundry and Refuse Collection services. That element has not been heretofore reviewed and requires that

> "[s]ervices are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission."

Plaintiffs point to the following Article, apparently a stock contract provision, contained in all the contracts:

> "The contractor fully recognizes that the services covered by this contract are vital to the NASA mission * * *"

They argue the services rendered are basically identical to those found to meet the Integral Effort test in other con-

[64] Report On: RCA Service Company Contract No. NAS 8-14110, U. S. Civil Service Commission, May, 1974, at page 6.

[65] See discussion of Pellerzi Elements 1, *supra* at 35-36, and 2 *supra* at 40-41.

tracts reviewed,[66] and that it is only necessary to show the work is related to a Federal function, and to NASA's assigned mission.

Government defendants and defendant-intervenor NCTSI view these services as house-keeping functions. They contend that the third element requires a determination of whether the function performed was essential to the Marshall mission, and that the emphasis should be placed on work "applied directly" to an agency's primary mission. They assert that plaintiffs interpretation would, by definition, apply to all contracts.

The Pellerzi Opinion states at page 21:

> "There has never been any dispute that support service contractor employees, working directly in support of agency mission, meet [the 5 U.S.C. § 2105(a)(2) criterion]. This criterion provides essentially the same yardstick as the common-law test of whether or not the work performed is part of the regular business of the employer. (*Restatement Agency,* § 220-h)." [67]

Unquestionably, Contractor employees are, in the broad sense, engaged in the performance of a Federal function. The inquiry, however, does not, as plaintiffs contend, stop there.

[66] This broad contention appears to be unfounded. Plaintiffs offer no specific examples and it appears to the Court that the Commission investigators consistently differentiated between support services of the housekeeping and technical variety when applying the Integral Effort element. *See* n.69, *infra.*

[67] The 5 U.S.C. § 2105(a)(2) criterion referred to requires that an "employee" must be an officer or individual who is—"engaged in the performance of a Federal function under authority of law or an Executive Act."

The common-law test referred to in the Pellerzi Opinion, "regular business of the employer", is further explored in that Opinion at page 33 as follows:

> "If support services contracting is an integral part of Goddard Operations required to accomplish the NASA mission assigned to its various organizational divisions, it necessarily follows that contractor personnel are performing the regular work of the agency."

The Mondello Supplement at page 2 offers only the following example (given in the context of approaching contract review reasonably) for clarifications:

> "Since Government agencies are responsible for accomplishing their missions, application of contract services to agency efforts integral to accomplishment of the basic mission is likely to be closely supervised."

The Commission's interpretation of the third Pellerzi Element is perhaps best summarized in its Report on NAS 8-21808, wherein it concluded that a function is not essential to the Marshall mission when

> "1. It is not a part of a function related to the MSFC mission.
>
> 2. It represents a complete function within itself and does not require support from any other function or office (it stands alone).
>
> 3. It does not require continuing day-to-day relationships with MSFC personnel." [68]

By placing the emphasis on the independent and secondary nature of the function as it did, the Commission correctly interpreted the third Pellerzi Element. The Commis-

[68] Report On: Hayes International Corporation Contract No. NAS 8-21808, by the U. S. Civil Service Commission. May. 1974. at page 10.

sion was also correct in concluding that the Integral Effort element was not present with respect to the Photo Repair, Custodial, Laundry and Refuse Collection services provided under NAS 8-14110 and NAS 8-21808.[69]

Similarly, the fourth Pellerzi Element, Comparable Services Performed by Civil Service Employees, was found not to be present as to the Photo Repair, Custodial, Laundry and Refuse Collection services. Application of the fourth element with respect to these particular contract services is simple and straight-forward. As in depth analysis of the fourth element would, therefore, serve no useful purpose and the Commission's conclusions as to these two contracts are adopted.

The fifth element, Service Beyond One Year, was found in all contract Appendices. The sixth element, Government Supervision, was found not to be present in any of the NAS 8-21808 appendices; it is the only element substantively reviewed in the NAS 8-14110 Report.

Both NAS 8-14110 and NAS 8-21808 included the standard provisions for Work Orders, a Responsible Official, Technical Directives, etc. NAS 8-14110 also contains the typical early contract provisions covering continuity of services, staffing plans and implementation of services, key personnel, contractor policies and procedures, overtime, qualifications required for positions within "Categories of Direct Labor" and assignment of certain employees.

[69] The analysis table attached to the Commission's Summary Report seems to indicate that the investigators were not entirely sure (notwithstanding their individual Reports) that those general mainenance type services supplied under NAS 8-14109 and NAS 8-21769, discussed *supra* at 30-31 met the Integral Effort element. Their ultimate conclusion was "YES!". Had the conclusion been "NO!", the third element would have been the only one not present, unlike the situation under NAS 8-14100 and NAS 8-21808. Since the maintenance services supplied under NAS 8-14109 and NAS 8-21769 can also be distinguished, the Court believes the Commission's conclusion was correct.

The Commission concluded that

> "the language of [NAS 8-14110] is considerably more restrictive than current contracts and in effect permitted the government to have a degree of control over the staffing and compensation of contractor's workforce, as well as review over personnel policies affecting contractor employees." [70]

The Commission also found examples of government supervision and control over Hayes International in the terms of NAS 8-21808, although "the language of the printed contract and the manner of performance thereunder are carefully programmed to avoid the appearance of direct supervision over contractor employees." [71] Those examples included government controls over Contractor employee working hours, and requirements for quality assurance programs, and submission of monthly progress and financial reports (and other reports as required).

The procedures under both NAS 8-14110 and NAS 8-21808 include: written task directives with approval upon completion by the Task Monitor; acceptance or rejection of oral requests for field maintenance work by signing of the Work Order; submission of a weekly report by the Quality Control Representative which in turn is checked by the Task Monitor; control of the Communications Division functions through management plans, control documents and standard operating procedures; and, weekly updating of task workloads subject to review by the Task Monitor. There are, of course, variations to the general practices, and in some instances, depending upon the particular support service, additional controls. The only changes in the administration of current contract NAS 8-21808 seems to be that more graphic arts, technical publication and documentation repository work has been transferred to Hayes International, and a more definitive division between contractor and government exists in terms of the kind of work being performed and the physical location of the employees. The Commission noted that

> "[w]ith respect to each Appendix, however, the pattern of Government supervisors supervising contractor supervisors is firmly established. In this connection, it is significant that Government supervisors issue instructions in writing as to the work to be performed, and have regular meetings with contractor supervisors to clarify written instructions, answer questions, resolve problems, or check up on customer complaints. Technical representatives 'monitor' work in progress and upon completion. The contractor is bound by certain MSFC policy directives, operating procedures and manual instructions. The contractor must submit progress reports and financial reports. His performance is evaluated continually by civil service personnel. A parallel workforce, which provides as a minimum one Government Supervisor for each contractor unit has been established to assure that the contractor's performance in all work areas measures up to the standards and specifications prescribed of the civil service organization." [72]

Making no comment on whether an Appendix-by-Appendix review is a reasonable approach to support service contract review, the Court concludes that, when realistically viewed, the Photo Repair, Custodial, Laundry and Refuse Collection services provided under NAS 8-14110 and NAS 8-21808 do not create the proscribed relationship. However, with respect to the balance of the services supplied, the Court further concludes that NAS 8-14110 and NAS 8-21808, by the terms thereof and the performance thereunder, do establish the proscribed employer-employee relationship.

[71] Report on Contract No. NAS 8-21808, *supra*, at 24.

[72] *Id.*, at 46-47.

IV. Contracts at Government-Owned Contractor-Operated Facilities

The last eight contracts investigated by the Commission are Government-owned Contractor-operated (GOCO) contracts providing support services at the Mississippi Test Facility (MTF) at Bay St. Louis, Mississippi and the Michoud Assembly Facility (Michoud) at New Orleans, Louisiana. Government defendants contend that these are mission-type contracts differing from the level-of-effort contracts reviewed above in that full management responsibility for operation of the facility rests with the Contractor, the contracts are not dependent upon Schedule Orders and Technical Directives (although it appears that both may still be issued) manhours and dollar ceilings are not contained in the initial contract, but may be subsequently negotiated, and no civil service workforce is present at the site. Government defendants, and defendant-intervenor NCTSI urge that the Commission's conclusions as to these GOCO contracts be affirmed.

Plaintiffs' position is that these contracts, even if they are mission-type GOCO contracts, are similar in form and substance to the level-of-effort contracts, and have not been authorized under 42 U.S.C. § 2473(b)(2). Plaintiffs argue that Government defendants originally saw no distinction since they determined the GOCO contracts were encompassed by the Court's Order of November 30, 1973 and instituted investigation. Great emphasis is placed upon the fact that the "satellite facilities" are owned by the Government which also supplies all of the tools, equipment and working space, and that Government defendants incorrectly argue there is no civil service workforce on site. Plaintiffs again challenge the Commission's inclusion as to each of the eight contracts.

A. Contracts at the Mississippi Test Facility

Under Contract Nos. w-410, effective July 1, 1963 to June 30, 1970, and its follow-on NAS 8-26010, effective

July 1, 1970 to July 31, 1971, the General Electric Company provided support services ranging from technical support to operation of maintenance shops and institutional services at the MTF. Subsequently, these services were split and covered upon separate competitively negotiated contracts, General Electric being awarded current Contract No. NAS 8-27750, effective August 1, 1971 through July 31, 1974, for technical support services. Global Associates was awarded current Contract No. 8-26896, effective July 12, 1971 through July 11, 1974, for facility operating services.

The Commission concluded that inasmuch as NAS w-410 and NAS 8-26010 with General Electric were operated in much the same manner as current contracts NAS 8-27750 and NAS 8-26896, the findings with respect to the current successor contracts should also apply to the earlier contracts. All four were found to meet all the Pellerzi Elements except the sixth, Government Supervision. Additionally, it was determined that the third element, Integral Effort, was not present in NAS 8-26896, and therefore was not present in those portions of NAS w-410 and NAS 8-26010 relating to facility maintenance work.

Notwithstanding the fact that the Commission's report, and the parties' memorandum have treated NAS 8-27750 as a mission-type contract, like the other three, it appears to the Court that NAS 8-27750 is in fact more like the level-of-effort contracts reviewed *supra*."[13]

1. Government Supervision was found not to be present under NAS 8-27750. This is a manhour contract. Responsibility for day-to-day administration and technical direction rests with the Responsible Official, who in turn selects civil

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[13] Report On: General Electric Company, Mississippi Test Facility, Bay St. Louis, Mississippi, Contract No. NAS 8-27750, by the U. S. Civil Service Commission, May, 1974, and the exhibits, including the contract itself, attached to the report.

service staff members as Achievement Coordinators and Achievement Monitors to assess performance against pre-established criteria. A Technical Work Request (TWR) or a Test/Operations Plan originates with specially designated civil service personnel. These requests specify the number of manhours, materials, dollar ceilings, delivery dates, quality level requirements, overtime authorized and special reporting requirements. Before final issuance, requests are

> "reviewed by NASA/MTF personnel for completeness, clarity, scope determination, and elimination of any personal services features. Detailed instructions necessary to accomplish all tasks are generated by contractor management and supervision and transmitted down to performing employees." [74]

Position classifications setting forth minimum education and experience requirements were included in the RFP. The contract contains a key personnel provision, and the Contractor must inform the Government of certain key personnel assignments. However, no staffing plan was required, no government influence is exercised in the selection, salaries, removal, reassignment or disciplinary action of Contractor employees, and work assignments are influenced only to the extent a particular work request may necessitate performance by uniquely or special skilled personnel. Affidavits of the Government monitors indicate that the ratio of Government monitors to Contractor employees is extremely low.

The Commission found that

> "the functions of the Mississippi Test Facility which are described in the Charter and delegated to the Director, have been redelegated by contract to the General Electric Company. MSFC-MTF civil service personnel appear to function in the broad sense as

[74] Report On: Contract No. NAS 8-27750, *supra*, at 14.

> 'Business Managers' and 'Coordinators' rather than technical supervisors. They apparently perform no substantive programs operations." [75]

Accordingly, after a review of the Commission's investigative report and supporting materials, the Court finds that although NAS 8-27750 is, in form, a level-of-effort type contract, and is therefore, as plaintiffs contend, similar to the contracts reviewed *supra*, the method of performance under it is distinguishable. The sixth Pellerzi Element, when properly applied, is not present to a substantial degree. And further, although five of the six Pellerzi Elements are present, when realistically viewed, the proscribed employer-employee relationship cannot be said to exist under NAS 8-27750.

2. As noted above, neither the Integral Effort nor Government Supervision elements were found to be present under NAS 8-26896.

With respect to the third element, Integral Effort, the Commission recognized the standard contract provision, "[h]owever overworked the phrase might be * * * must be given due weight as a part of the contract." [76] It found that

> "while a case can be made that the services (or most of them) provided by this contract are legitimate functions, there was no indication the services applied to an integral effort of MTF—since MTF has no visible Civil Service Organization for carrying out the functions or services." [77]

[75] *Id.*, at 14-15.

[76] Report On: Global Associates Contract No. NAS 8-26898 by the U. S. Civil Service Commission, May, 1974, at pages 7-8.

[77] *Id.*, at 8.

Transportation services are apparently the only services supplied under NAS 8-26896 that have ever been provided by civil service employees.

Turning now to the sixth element, Government Supervision, under NAS 8-26896 Global Associates

> "is to provide the services required on a mission basis; however, since the extent and exact nature of these services cannot be determined in precise detail, a manhour and dollar ceiling was established through the course of negotiations, and subsequently set forth in ARTICLE II of the resultant contract. The establishment of these ceilings provides the upper limit or scope of the contract. The purpose of the so defined 'scope' is to establish a definitive manner that point wherein the Contractor has fulfilled his obligations under the contract." [78]

NAS 8-26896 does not specify personnel requirements in any fashion, either by number, skills, or skill levels.

It appears that the methods of securing NASA-MTF maintenance support services of this type were changed in 1971 when this contract became effective, and that issuance of Schedule Orders and Technical Directives was initiated. However,

> "[t]he Contract instrument itself is the contractor's authorization to perform work. No form of a work ordering system is required in regard to the contractor's performance of repetitive services. However, a work order system for requesting non-repetitive services is employed." [79]

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[78] Affidavit of William L. Goodrich, Contracting Officer, Exhibit A at page 7, attached to Report On: Global Associates Contract No. NAS 8-26896, *supra*.

[79] *Id.*, at 16.

The contract was still viewed as a mission-type contract by the Commission investigators since "the Contractor is required to fully manage and discharge his operations and obligations under the contract; and to this extent, is not required to respond to Government issued Schedule Orders or Technical Directives." [80] The Commission concluded:

> "Although the Government has imposed certain controls, such as frequent reports, including reports concerning work progress and status, as well as financial reports, the program evaluation procedures—for the most part the contractor apparently operates the facility and performs the services required by the contract on his own." [81]

The Court finds that the Commission correctly applied the third Pellerzi Element and concluded the maintenance support services were not applied directly to integral effort in furtherance of the NASA-MTF mission. The Court also finds that Government Supervision was not present to a substantial degree in NAS 8-26896.

The Commission Reports on the early contracts, NAS w-410 and its follow-on, NAS 8-26010, both with General Electric, are not very enlightening,[82] except insofar as they report the contracts were mission-type contracts, and that detailed operating plans for implementation of services were drawn-up by the Contractor in consultation with the Contracting Officer, and subject to his approval. Both Reports urge that the findings made as to NAS 8-27750 and NAS 8-26896, should be applied.

Following this recommendation, and notwithstanding the differences observed above in the current successor

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[80] *Id.*, at 7; Report On: Contract No. NAS 8-26896, *supra*, at 3.

[81] Report On: Contract No. NAS 8-26896, *supra*, at 14-15.

[82] As to each, the Commission submitted a skeleton report, and a copy of the contract itself.

contracts, the Court concludes that NAS w-410 and NAS 8-26010, and their successors, NAS 8-27750 and NAS 8-26896, do not establish a relationship tantamount to that of employer-employee between NASA and the Contractors' non-civil service employees.

B. Contracts at the Michoud Assembly Facility

The last four contracts reviewed pursuant to the November 30, 1973 Order, were for support services provided at Michoud. As to each, the Commission found that Pellerzi Elements 3, Integral Effort, and 6, Government Supervision, were not present to a substantial degree.

1. Under Contract No. NAS 8-14017, effective March 1, 1965 through May 31, 1971, and its follow-on, current Contract No. 8-26887, effective June 1, 1971 to May 31, 1974, the Mason-Rust Company has provided plant operation support services at Michoud. These services include: transportation, security, fire protection, photographic, medical, food, supplies, telecommunications, custodial, plant engineering and maintenance, and reproduction and documentation.

They are reviewed together since the Commission investigators determined that NAS 8-14017 "was operated in substantially the same manner as the present Mason-Rust, NAS 8-26887. Therefore, the findings with respect to the latter contract applies [*sic*] also to this contract." [83]

Looking first at the Integral Effort element, the standard contract clause recognizing that the services are "vital to the NASA mission" is present in both contracts. The Commission found that

> "while the functions covered by [these] contract[s] are set forth in the Official Charter and responsibility for the operation of this facility has been delegated to the civil service Manager there is no indication that the services are applied to an integral effort. There are approximately 28 civil service employees not counting clerical support personnel located at the Michoud Assembly Facility. These employees are engaged in monitoring and evaluating the contractor's effort. They do not perform operating functions." [84]

[83] Report On: Mason-Rust Company Contract No. NAS 8-14017 by the U. S. Civil Service Commission, May, 1974, at page 3.

The Commission concluded that "the Manager, Michoud Assembly Facility has redelegated the operation of the facility to the contractor." [85]

With respect to the sixth element, Government Supervision, both NAS 8-14017 and NAS 8-26887 are mission-type contracts for facility operating services. They are managed by broad "Statement of Work" which is included in the contract itself. Although there is a Responsible Official, charged with day-to-day administration and technical surveillance, neither Task Orders nor Work Directives are issued. Various Contractor reports are required, but there are no manhour controls. Evidence adduced during the investigation indicates that the Government

> "does not control the number of employees employed by Mason-Rust, makes no determination of the kind of employee utilized under the contract, does not establish any of the qualifications of various employees and does not determine or specify the work assignments." [86]

[84] Report On: Mason-Rust Company Contract No. NAS 8-26887 by the U. S. Civil Service Commission, May, 1974, at page 6.

[85] *Id.*, at 7.

[86] Affidavit of Milton H. Kalskett, General Manager, Mason-Rust, at page 9, attached to Report On: Mason-Rust Company Contract No. NAS 8-26887, *supra*.

The Commission concluded its Report on NAS 8-26887 (and by application on NAS 8-14017):

> "[A]lthough the Government has imposed controls to assure that the contractor's operations are contained within the terms of the contract and performed according to acceptable standards there is no indication of supervision in the sense intended by this element of the standards." [87]

2. Operations and maintenance of all computing and associated equipment support services have been provided to the Michoud Computer Complex under Contract No. NAS 8-17203, effective January 8, 1966 through January 7, 1971, with Service Technology Corporation, and its current follow-on, NAS 8-26034, effective February 1, 1971 through June 30, 1974, with Computing and Software, Inc. The services include such items as computer operations and maintenance, logistics support, software systems maintenance, applications programming, consulting assistance to users, and general maintenance required to support a computer installation.

Since the Commission concluded that NAS 8-17203 was "essentially the same as contract NAS 8-26034, Computing and Software, Inc., and the findings with respect to the latter apply to the operation of [NAS 8-17203]",[88] the contracts are reviewed together.

Like the previous two contracts, analysis of these contracts with respect to the Integral Effort standard must begin by noting that both contain the stock contract provision calling the services "vital" to the NASA mission. The Commission found:

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[87] Report On: Mason-Rust Company Contract No. NAS 8-26887, *supra*, at 8.

[88] Report On: Service Technology Corporation Contract No. NAS 8-17203, by the U. S. Civil Service Commission, May, 1974, at page 2.

> "The service provided by this contract are considered by the terms of the contract * * * and the Responsible Official * * * essential to the 'NASA mission'. * * * However, the services cannot be considered part of an integral effort because the contractor performs all of the services. There is no civil service organization, nor civil service employees assigned as operating personnel." [89]

The Commission opinioned that while the services were properly included in the functional statement and within the responsibility of the Computer Complex Director, the

> "actual operations of the facility, as well as operation and maintenance of Computing Services has been delegated by contract to Computing and Software, Inc. [and Service Technology Corporation.]." [90]

Turning to the Government Supervision element, the contracts reveal that day-to-day administration and technical direction rests with the Responsible Official. Both are mission-type contracts managed by a general "Scope of Work" with no manhour guidelines or limitations on the Contractors. There are no procedures for ordering work, such as through the use of Schedule Orders, Technical Directors, or other work requests.

The Commission thus concluded that

> "the manner in which the contract is administered gives the contractor a free hand in planning, organizing and performing the work to be done.
>
> The controls instituted by the Government, *e.g.* reports, are considered to be after the fact and mainly

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[89] Report On: Computing and Software, Inc. Contract No. NAS 8-26034, by the U. S. Civil Service Commission, May, 1974, at page 5.

[90] *Id.*, at 6.

for the purpose of evaluating the services rendered by the contractors."[91]

As to each of these four contracts, NAS 8-14017, NAS 8-26887, NAS 8-17203 and NAS 8-26034, the Court adopts the Commission's finding that the Integral Effort element was not present to a substantial degree. When the sixth standard is applied to these contracts, and operations thereunder realistically viewed, the Court further finds Government Supervision of Contractor employees was not, and is not, present. Having determined that Pellerzi Elements 3 and 6 are not present to a substantial degree, these contracts cannot be found to establish the proscribed employer-employee relationship between NASA and the Contractor non-civil service employees.

XV. Conclusions

As observed in the Pellerzi Opinion, a myriad of factors, conditions and circumstances must be balanced and weighed when applying the Pellerzi Elements to each of the 32 contracts determined by the Commission to be within the scope of the Court's November 30, 1973 Order.

Having thus reviewed the Commission's application of the Pellerzi Elements to these contracts, and having further analyzed specific contested conclusions on a contract-by-contract basis, and it appearing that there is no genuine issue as to any material fact, the Court concludes that consistent with the findings of fact and conclusions of law made in this Memorandum Opinion, that, as a matter of law, plaintiffs are entitled to summary judgment with respect to those support service contracts establishing the proscribed employer-employee relationship; and further, that defendants and intervenor-defendant NCTSI are entitled to summary judgment with respect to those contracts found not to have established said relationship.

[91] *Id.*, at 7-8.

Therefore, regarding those support service contracts upon which they have prevailed, plaintiffs are entitled to judgment: declaring that said contracts are proscribed by 42 U.S.C. § 2473(b)(2) and the Federal personnel laws, and are null and void; enjoining NASA from extending, renewing, or giving further effect to said contracts, and directing NASA to terminate said contracts at the earliest possible date; declaring unlawful the RIF actions which took place in 1967, or thereafter, demoting or discharging Civil Service employees from their positions by reason of the existence of the support service contracts found hereinabove to be null and void; and, directing NASA to cancel any and all such RIF actions, and to reinstate all such Civil Service employees thereby affected to their lawful positions with back pay and employee benefits.

Defendants and intervenor-defendant NCTSI are likewise entitled to judgment declaring lawful the contracts upon which they have prevailed. An Order denying plaintiffs' motion to punish defendants Civil Service Commissioners and their General Counsel for contempt will be entered, the Order to Show Cause dated April 1, 1974 will be dissolved and the Rule discharged.

/s/ Joseph C. Waddy
Joseph C. Waddy
United States District Judge

Date: August 12, 1976

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 78-96

In the Supreme Court of the United States

OCTOBER TERM, 1978

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., PETITIONERS

v.

ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-38a) is not yet officially reported. An earlier opinion of the court of appeals is reported at 436 F. 2d 882. The opinion of the district court (Pet. Supp. App. 23-85) is reported at 424 F. Supp. 186. An earlier opinion of the district court (Pet. Supp. App. 3-22) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1978. A timely petition for rehearing was denied on April 19, 1978 (Pet. Supp. App. 1). The petition for a writ of certiorari was filed on July 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether certain support service contracts entered into by the National Aeronautics and Space Admininstration are invalid under NASA's enabling act or the civil service laws.

STATEMENT

Section 203(b)(2) of the National Aeronautics and Space Act of 1958, as amended, 42 U.S.C. 2473(b)(2), authorizes the Administrator of the National Aeronautics and Space Administration to appoint and fix the compensation of employees "in accordance with the civil-service laws." Section 203(b)(5) of the Act, as amended, 42 U.S.C. 2473(b)(5), authorizes NASA to "enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate, * * * with any person, firm, association, corporation or educational institution."

NASA entered into contracts with private companies for support services at the George C. Marshall Flight Center, Huntsville, Alabama [the "Marshall Center"] (Pet. App. 8a; Pet. Supp. App. 23, 29). The services covered by the contracts ranged from routine maintenance to sophisticated technical assistance (Pet. App. 5a n.3; Pet. Supp. App. 7). In 1967 the annual value

of the contracts was approximately $70 million, and the number of support contractor personnel was 8,218 (Pet. App. 4a-5a n.1; Pet. Supp. App. 7).

As a result of budget cuts, NASA reduced its work force. It sent reduction in force ("RIF") notices to the six individual petitioners and approximately 760 other civil service employees at the Marshall Center on December 6, 1967. Under the RIF procedure, these employees would either be separated from government service or assigned to a lower grade or pay (Pet. Supp. App. 4). The support contractor personnel at the Marshall Center, who are not civil service employees, were not subject to any reduction in force, although, of course, the support contracts themselves were subject to termination or revision periodically (Pet. Supp. App. 4).

The six individual petitioners and their union filed this action on December 27, 1967, seeking declaratory and injunctive relief, reinstatement, and back pay and benefits. They argued that the support services contracts were invalid under Section 203(b)(2) of the Act, and that they violated civil service laws and regulations and the union's collective bargaining agreement with NASA (Pet. Supp. App. 4). Petitioners contended that the support contractor personnel functionally were employees of the federal government and should have been melded into the tenure roster, with the result that fewer of petitioners would have been subject to the RIF (Pet. App. 5a n.5). At the same time as they pursued this action, petitioners appealed administratively to the Civil Service Commission (436 F. 2d 882, 886).

The district court granted a preliminary injunction, halting the RIF pending the resolution of discussions between the Civil Service Commission and NASA concerning the legality of the RIF (Pet. Supp. App. 4-5).

A month later the Commission and NASA reached an agreement providing that all but 166 of the RIF notices were to be cancelled (*id.* at 5). The district court dissolved the preliminary injunction after this agreement was reached, and it dismissed the case for failure to exhaust administrative remedies (*ibid.*).

Petitioners appealed; while the appeal was pending, the Civil Service Commission issued a final decision upholding the RIF action (436 F. 2d at 895-896). In light of this, the court of appeals vacated the dismissal order and remanded the case to the district court, suggesting that petitioners be granted leave to file a supplemental pleading alleging exhaustion of administrative remedies (436 F. 2d at 897-898).[1]

On remand the district court granted partial summary judgment in favor of petitioners. The court held that Section 203(b)(2) of the Act prohibits NASA from entering into or enforcing support service contracts that create an "employer-employee" relationship between NASA and the support contractor personnel (Pet. Supp. App. 21-22). The court further held that if any of the Marshall Center support contractor personnel functionally were "employees" of NASA, the RIF to which petitioners and others had been subjected violated their retention preference rights, as spelled out in 5 U.S.C. 3501 *et seq.* and 5 C.F.R. 351 *et seq.* (Pet. Supp. App. 18). Finally, the court held that, in deciding whether the support contractor personnel at the Marshall Center functionally were employees of NASA, the standards set forth in a 1967 opinion of the general counsel of the Civil Service Commission, Leo Pellerzi, should be applied (*id.* at 21).

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[1]The court of appeals also rejected challenges to petitioners' and the intervenor's standing to sue (436 F. 2d at 890-894, 898-899).

Nevertheless, the district court did not grant petitioners immediate relief. Instead, the court referred the matter to the Civil Service Commission, with instructions to apply the "Pellerzi Standards" to the Marshall Center support services contracts and to report to the court whether these contracts created an employer-employee relationship between NASA and the support contractor personnel (Pet. Supp. App. 22).

The Civil Service Commission submitted its report, concluding that under the "Pellerzi Standards," as clarified by an opinion of the succeeding general counsel, Anthony Mondello, none of the 32 support service contracts at the Marshall Center created an employer-employee relationship between NASA and the support contractor personnel (Pet. Supp. App. 29).

The district court reviewed the report, to which it said it was bound to give "substantial consideration and great weight" (Pet. Supp. App. 33), and analyzed each of the Marshall Center support services contracts. It held that 22 of the contracts created an employer-employee relationship between NASA and the support contractor personnel and were invalid, two more contracts were partially invalid, and eight were valid (*id.* at 23-85). Accordingly, the court declared that the RIF actions against petitioners and other civil service employees were "unlawful," and it ordered NASA to cancel all such RIF actions and reinstate any demoted or discharged employees with back pay and employee benefits (*id.* at 85).

The court of appeals reversed (Pet. App. 3a-38a). It rejected petitioners' broad contention that Section 203(b)(2) of the Act prohibits NASA from using independent contractors and their employees to carry out

what petitioners termed NASA's "regular work functions" (Pet. App. 15a). The court concluded that that contention is contrary both to the purpose of Section 203(b)(5), which expressly authorizes NASA to contract with any person or entity in the performance of its functions, and to Congress' awareness and approval of the agency's contracting practices in consistently appropriating funds for those purposes (Pet. App. 14a-16a 35a-37a).

The court of appeals agreed with the district court that the dispositive issue is whether contractor personnel at the Marshall Center were treated as employees of NASA (Pet. App. 17a). Relying on *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318 (1974), the court of appeals disagreed with the standard applied by the district court to determine whether the support contractor personnel functionally were NASA employees. The court of appeals held that the "*degree of control* or *supervision* is the principal element that differentiates employees and independent contractors at common law, in the state statutory context, and in the context of other federal statutes as well" (Pet. App. 18a-20a).[2]

Applying that standard to the Marshall Center support services contracts and the record developed by the Commission, the court of appeals concluded that the Commission had correctly determined that none of the contractors' employees had been treated as NASA employees. The court stated (Pet. App. 21a-22a):

> the individual companies, not NASA, were to furnish the necessary management and personnel. It was the responsibility of each company to supervise, control, and direct the performance of its own employees in fulfilling the contract's requirements. These contracts required the companies to exercise their independent judgment. This is the classic independent contractor relationship.
>
> * * * * *
>
> Without supervision by NASA, the employees of the contractors for the supporting services cannot be viewed as employees for subsection (b) (2) purposes who must be appointed in accordance with the civil service laws.

[2]The court of appeals found that this approach is not inconsistent with the "Pellerzi Standards" as clarified by the "Mondello Supplement" (Pet. App. 23a-24a).

ARGUMENT

The decision of the court of appeals turns on the construction of contractual terms and the particular facts of the case; the issues it resolves are unexceptional. There is no conflict among the circuits and no reason for review by this Cou .

1. The principal issue considered by the courts below and the Civil Service Commission was whether, under established criteria, the employees of independent contractors at the Marshall Center acted as employees of NASA and thus, under Section 203(b)(2) of the Act, should have been appointed under the civil services laws. Petitioners do not directly address that issue; as in the court of appeals; their principal contention appears to be that Section 203(b)(2) requires NASA to "perform [all of] its regular governmental work functions" (Pet. 11) with "employees employed under the civil service laws" (*ibid.*; see generally Pet. 11-20). In other words, petitioners argue that NASA may not contract with independent contractors for work that could be performed by NASA employees. As the court of appeals held, that argument would read out of the statute Section 203(b)(5), which

authorizes NASA to "enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work * * * with any person, firm, association, corporation or educational institution."

Section 203(b)(2) provides only that officers and employees appointed by NASA—*i.e.*, NASA employees—shall be covered by the civil service and compensation laws. The court of appeals accepted the proposition that NASA cannot use outside contracts to engage persons who in all material respects serve as employees of NASA, since NASA employees must be appointed by the Administrator and must be subject to the civil service and compensation laws. But neither Section 203(b)(2) nor any provision of the civil service laws suggests that NASA, or any other agency, may not engage independent contractors and their personnel to do work that could be performed by NASA employees, or that could be described as a "governmental work function."

As the court of appeals stated (Pet. App. 14a-15a), petitioners' contention to the contrary "completely disregards the signficance of subsection (b)(5) which follows and bears directly on support service contracts * * *." Because everything a governmental agency does conceivably could be performed by federal employees, or could be described as a "governmental work function," petitioners' contention would prohibit contracting by NASA. But Congress unquestionably expected that "the contemplated expansion of functions of [NASA] will take place largely by means of contract work rather than through research conducted by the agency itself." 104

Cong. Rec. 9918 (1958) (remarks of Rep. McCormack).[3] See generally the court's analysis at Pet. App. 10a-17a, on which we rely.[4]

2. Having correctly rejected petitioners' broad contention, the court of appeals addressed the "narrower question" whether the contracts were "improperly administered so as to treat the contractor's employees as subsection (b)(2) employees * * *" (Pet. App. 17a). After reviewing the relevant statutes, the standards developed by the Civil Service Commission, and this court's opinion in *Kelly* v. *Southern Pacific Co.*, 419 U.S. 324 (1974), the court affirmed the Commission's determination that none of the contractor personnel had been treated as NASA employees. Pet. App. 17a-26a. Petitioners do not challenge the standards employed by the court of appeals or the application of those standards to the particular facts. There is therefore no reason for this Court to review that conclusion.

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[3]Petitioners' position is not supported by the fact, on which they rely (Pet. 16-20), that Section 203(b)(2) specifically exempts 425 NASA employees from civil service laws. As the court of appeals correctly stated, that exemption pertains only to employees of NASA and has nothing to do with employees of independent contractors engaged under Section 203(b)(5), which "is more than an exception to subsection (b)(2); it covers a different situation altogether." Pet. App. 15a.

[4]There is nothing to petitioners' claim (Pet. 21) that the court of appeals erred in finding additional support for its conclusions in Congress' awareness of NASA's support service contracting and its continued appropriation of funds for those purposes (see Pet. App. 35a-37a). Those appropriations are consistent with and confirm Congress' original expectation that NASA would rely significantly on outside contracting. The court did not read the appropriations legislation as changing the substantive legislation. Compare *Fleming* v. *Mohawk Wrecking and Lumber Co.*, 331 U.S. 111, 116 (1947), with *Tennessee Valley Authority* v. *Hill*, No. 76-1701 (June 15, 1978), slip op. 33-38. *United States* v. *Langston*, 118 U.S. 389 (1886), which involved such an argument, therefore is inapposite.

3. Petitioners also err in contending (Pet. 2, 8-10, 13-16) that the decision below is contrary to a different panel's decision in 1970 in the same case and contrary to determinations of the Comptroller General and the Civil Service Commission. The 1970 decision dealt only with issues of standing and exhaustion of administrative remedies. See 436 F. 2d at 898. At all events, any conflict between decisions of the same appellate court would be for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

The determinations of the Comptroller General and the Commission to which petitioners refer (Pet. 6-7) were made with respect to *other* contracts entered into by NASA at the Goddard Space Center, not to the support services contract entered into at the Marshall Center. With respect to the Marshall Center contracts, the Civil Service Commission's position is clear; it concluded, in the proceedings required by the district court, that the contracts are valid and not in violation of the civil service laws (Pet. App. App. 29).[5]

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[5]Petitioners' final contention (Pet. 22-24)—that the decision below conflicts with *Wheelabrator Corp.* v. *Chafee*, 455 F. 2d 1306 (D.C. Cir. 1971) is insubstantial. *Wheelabrator* stands for the proposition that a district court should, in appropriate cases, refer particular issues to agencies expert in the subject matter for the court's guidance, but that the court should still have "the last word." 455 F. 2d at 1316-17. The court of appeals here applied those principles, and the fact that it agreed with the Commission rather than the district court does not suggest otherwise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-96

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, *et al.*, *Petitioners*

v.

ADMINISTRATOR, NATIONAL AERONAUTICS & SPACE ADMINISTRATION, *et al.*, *Respondents*

and

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES, *Intervenor-Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INTERVENOR-RESPONDENT NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF INTERVENOR-RESPONDENT NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This Brief is submitted on behalf of the Intervenor-Respondent National Council of Technical Service Industries ("NCTSI") in opposition to petitioners' request that a writ of *certiorari* issue to the United

States Court of Appeals for the District of Columbia Circuit.[1]

In their petition, petitioners have set forth a misleading and highly inflammatory description of the opinion below and of its significance. Contrary to petitioners' assertions, this is not a case which marks the death knell of the civil service system at the National Aeronautics and Space Administration ("NASA") or elsewhere in the Federal Government; it is not a case which permits the Government to contract out vast portions of its regular, day-to-day civilian governmental work functions to the detriment of the civil service; and it is not a case in which the Court of Appeals' decision conflicts with any decision of this Court or, for that matter, of any Court. To the contrary, as we will show herein, the Court of Appeals has set forth a well-reasoned analysis of the applicable provisions of the Space Act of 1958 and when, consistent with that statute and the decisions of this Court, improper administration of Government contracts may render such contracts unlawful.

Because the petition for *certiorari* filed herein contains significant misstatements of fact as to the matters in dispute and the proceedings below, we have set forth a detailed counterstatement of the case before setting forth the reasons why a writ of *certiorari* should not issue in this case.

[1] NCTSI is an association of companies which provides a substantial amount of the more than $8.5 billion of support services which various Government agencies secure by contract from private industry each year.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that Section 2473(b)(5) of the Space Act, 42 U.S.C. § 2473(b)(5), authorizes NASA to enter into "support service" contracts?[2]
2. Whether the Court of Appeals correctly held that neither Section 2473(b)(2) of the Space Act, 42 U.S.C. § 2473(b)(2), nor the Federal civil service laws render support service contracts entered into by NASA with private contractors illegal *per se*?
3. Whether the Court of Appeals correctly held that lawful support service contracts may be rendered unlawful if they are improperly administered by NASA?
4. Whether the Court of Appeals correctly held that NASA did not improperly administer its support service contracts at the Marshall Space Flight Center?

[2] The "support service" contracts in issue in this case run the gamut of tasks, ranging from the performance of complex analytical and scientific missions (*e.g.*, engineering analysis, design performance analysis) to the performance of housekeeping tasks at the Marshall Space Flight Center (*e.g.*, medical, security, and transportation services). The scope of these services as performed for the Government as a whole by private industry has been described by the predecessor to the Office of Management and Budget as "infinite":

> "There is virtually an infinite variety of services the different agencies require in carrying out their assigned missions. They range all the way from mundane activities such as guard and window washing services on through to an activity as unique and complex as that of moving a 6-million pound Saturn rocket, 360 feet high, in an upright position, from an assembly building to a launching pad 3 miles away, by means of a giant 'crawler' . . . ." Hearings Before a Subcommittee of the House Committee on Government Operations, 90th Cong., 2d Sess. p. 34 (1968).

COUNTERSTATEMENT OF THE CASE

This case involves a challenge by civil service employees and their labor organizations to the means by which NASA performs its various functions at the Marshall Space Flight Center ("MSFC") in Huntsville, Alabama. Since NASA's establishment, the support services essential to the performance of its missions have been performed in two ways: (1) by civil service employees pursuant to the authorization of the Federal civil service laws; and (2) by contracts with private companies which, pursuant to the authorization of the Federal procurement laws, agree to of which of these two systems to use has been made perform certain tasks for NASA. The determination by NASA since its formation in 1958 after review of a host of complex policy considerations, such as comparative costs and availability of resources in the private and public sectors. The use of these parallel and complementary systems has resulted in the development since 1958 of a "Government/Industry/Education Space team" at NASA which has been used effectively to accomplish NASA's critical tasks.[3]

The Procedural Background of the Case

This case was brought after an announcement by NASA on December 6, 1967, of a reduction in force ("RIF") of certain civil service employees employed at MSFC. In their complaint, the plaintiffs did not assert that the RIF violated the specific statutes and regulations applicable to RIFs. Instead, the plaintiffs

[3] (Appendix, p. 13a.) All citations in this Brief to "Appendix" are to the opinion of the Court of Appeals filed with the petition. References to the "Joint Appendix" are to the Joint Appendix submitted below.

claimed that, while the RIF was being conducted, NASA had in existence contracts for certain support services at MSFC being performed by private companies. The plaintiffs asked that these contracts be declared unlawful.

On April 28, 1968, the District Court dismissed the complaint for lack of standing and failure to exhaust administrative remedies. On April 21, 1970, the Court of Appeals (per Circuit Judges Robinson and Tamm) reversed the District Court's decision and remanded the matter to the District Court. 141 U.S. App. D.C. 152, 436 F.2d 882. In an extensive opinion, Circuit Judge Robinson held that the plaintiffs had standing to maintain this action.[4]

Upon remand to the District Court, the parties filed cross motions for summary judgment. On November 30, 1973, the District Court issued partial summary judgment in favor of the plaintiffs. In this decision, the Court found that support service contracts could in certain instances violate Federal civil service laws and the Space Act of 1958. The Court referred the question of whether the specific MSFC contracts in issue violated these laws to the Civil Service Commission and, after specifying the standards to be applied, directed the Commission to investigate the contracts and report to the Court.

Based on this order, the Civil Service Commission conducted an exhaustive investigation of the MSFC support service contracts. On May 30, 1974, the Commission filed an extensive report of its investigation

[4] Circuit Judge Robinson stressed in his opinion that no view was being expressed by the Court of Appeals as to any aspect of the merits of the case. Circuit Judge Tamm concurred.

with the District Court. This report concluded that all of the contracts in issue at MSFC were lawful and that none of the contractor personnel were treated as "employees" of NASA.

In September 1975, the various parties again filed motions for final summary judgment. On August 12, 1976, the District Court entered final summary judgment. In this decision, the Court held that, notwithstanding the contrary findings of the Civil Service Commission, 22 of the 32 support service contracts at MSFC (and portions of two others) were unlawful.

The Court of Appeals Decision in Issue

On March 20, 1978, the Court of Appeals (per Circuit Judges MacKinnon and Robb)[5] reversed the judgment of the District Court and ordered the complaint herein dismissed.[6] In an exhaustive opinion, the Court held that all of the MSFC contracts in issue were lawful.

According to the Court of Appeals, that NASA "was authorized to enter into support service contracts . . . is beyond serious dispute." (Appendix, p. 16a.) The Court held that Section 2473(b)(5) of the Space Act,

[5] Mr. Justice Clark heard oral argument, but died before the decision of the Court of Appeals was announced.

[6] Petitioners have repeatedly contended in their petition that the 1978 opinion in issue here was somehow at odds with the Court of Appeals' 1970 decision. This is, of course, a somewhat novel basis for seeking *certiorari* from this Court. It is also, as a reading of both decisions will show, without merit. In any event, the best answer to this contention is that, on April 19, 1978, a suggestion for rehearing *en banc* of the 1978 decision was denied by the entire panel of the Court of Appeals with no Judge in the Circuit voting to the contrary.

42 U.S.C. § 2473(b)(5), provided "specific statutory authority" for NASA to enter into such contracts and that nothing in the Act rendered such contracts illegal *per se*.[7] (*Id.*, p. 15a.)

The Court recognized that another section of the Space Act, 42 U.S.C. § 2473(b)(2), required that NASA's "employees" be appointed in the civil service of the United States.[8] However, the Court held that this provision was not at odds with the authority granted in Section 2473(b)(5) of the Space Act to enter into support service contracts: "it covers a different situation altogether" and was, according to the Court, a recognition of the complementary roles at NASA envisioned by Congress for the civil service and private industry. (Appendix, pp. 14a-15a.)

At the same time, the Court of Appeals noted that, although the provisions of the Space Act dealing with contracts and the civil service were complementary, support service contracts could violate Section 2473(b)(2) and the civil service laws if the contracts were "improperly administered" and "used to circumvent" the civil service laws. (Appendix, pp. 15a, 17a.) This meant, according to the Court, that a lawful contract could be rendered unlawful if "NASA treats the em-

[7] For ease of reference, we will refer to this provision as Section 2473 of the Space Act since this is the reference used by the Court below. The official citation, in light of a recent recodification, is Section 203(b)(2), Pub.L. No. 85-568, 72 Stat. 426, 42 U.S.C. § 2473(c). Section 2473(b)(5) is set out in full in the appendix to the petition.

[8] Subsection (b)(2) contains an exception, not material here, which permits the Administrator of NASA to appoint up to 424 "employees" without regard to the requirements of the civil service laws.

ployees of the contractor as subsection (b)(2) appointed employees . . . ." (*Id.*, p. 15a.) Put another way, the Court of Appeals held that contracts were lawful "so long as the contractor's employees are not treated [by NASA] as employees within the meaning of the civil service laws." (*Ibid.*)

The Court then held that the key factor in determining whether contracts were improperly administered and contractor employees made into *de facto* Government "employees" was the extent to which Government personnel "supervised" the physical conduct of contractor's employees so that such employees became, in effect, Government "employees." (Appendix, p. 18a.)[9] Applying this Court's definition of supervision in *Kelly* v. *Southern Pacific Co.*, 419 U.S. 318 (1974), the Court exhaustively reviewed the facts with respect to the MSFC contracts in issue and found that supervision by NASA of support service contractor employees did *not* exist; that there was a "classic independent contractor relationship" between the contractors and NASA at MSFC; and that, therefore, none of the contractor employees had been treated as "employees" of NASA within the meaning of subsection (b)(2). (*Id.*, p. 21a.) According to the Court:

[9] The Court reasoned that:

"Employees are distinguished from independent contractors most basically by the detail with which the party for whom the work is eventually produced actually supervises the manner and means by which the work is performed; and *degree of control* or *supervision* is the principal element that differentiates employees and independent contractors at common law, in the state statutory context, and in the context of other federal statutes as well." (Appendix, pp. 18a-20a.) (Footnotes omitted.) (Emphasis in original.)

> "The situation here involves NASA entering into written contracts with various companies to perform special services. In each contract, NASA looked to the company that hired the individuals to perform certain tasks. However, the individual companies, not NASA, were to furnish the necessary management and personnel. *It was the responsibility of each company to supervise, control and direct the performance of its own employees in fulfilling the contract's requirements.* These contracts required the companies to exercise their independent judgment. *This is the classic independent contractor relationship.*" (*Ibid.*) (Emphasis supplied.)[10]

Based on the foregoing, the Court of Appeals concluded that the 32 MSFC contracts in issue were fully lawful in all respects and ordered the complaint herein dismissed.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

In their petition to this Court, petitioners advance a host of reasons why a writ of *certiorari* should be issued in this case. We respectfully submit that, putting the somewhat hysterical rhetoric of the petition to one side, there is no basis for the issuance of *certiorari* and review of the Court of Appeals' decision.

[10] In addition to conducting its own analysis of the MSFC contracts, the Court noted that the District Court had directed the Civil Service Commission to conduct an exhaustive investigation of the MSFC contracts and that, based on that investigation, the Commission had concluded that every MSFC contract was properly administered and fully lawful. According to the Court, there was "substantial support in the record" for the Commission's conclusions and, therefore, no basis for the District Court to have rejected the Commission's findings with respect to the contracts. (Appendix, pp. 28a-29a.)

A. THE COURT OF APPEALS CORRECTLY HELD THAT NASA HAS BROAD AUTHORITY TO ENTER INTO SUPPORT SERVICE CONTRACTS

Petitioners challenge the conclusion of the Court of Appeals that NASA may appropriately enter into support service contracts to perform those of its functions which it considers may best be performed by private industry. In petitioners' view, no such authority exists and all NASA service functions must be performed by the civil service. However, the Space Act and its legislative history fully supports the Court of Appeals' conclusion that NASA's "authority to enter into support service contracts . . . is beyond serious dispute." (Appendix, p. 16a.)

As the Court of Appeals recognized, NASA's authority to enter into support service contracts is found in the Space Act of 1958. This statute states, in no uncertain terms, that:

> "In the performance of its functions . . . [NASA] is authorized— . . .
>
> "(5) . . . *to enter into and perform such contracts,* leases, cooperative agreements, or other transactions *as may be necessary in the conduct of its work and on such terms as it may deem appropriate,* with any . . . person, firm, association, corporation, or educational institution." 42 U.S.C. § 2473(b)(5). (Emphasis supplied.)

According to the Court of Appeals, the legislative history of this provision makes clear that it means exactly what it says. The Space Act was intended to create an agency with power "to move with decision and dispatch" and with a "minimum of redtape" and made certain that NASA would have "the highest degree of flexibility" in its operations.[11] The reason for this was clear: as the Court of Appeals noted, the establishment of NASA "embodied the American response to the shattering effect that the Soviet's Sputnik had on our international stature in the post-World War II era." (Appendix, p. 11a.) Thus, the bill establishing NASA was designed to "invoke the participation of private industry and of educational institutions in embarking on the nation's space effort." (*Id.,* p. 12a.)

In establishing NASA, Congress expressly intended that NASA would have a small number of civil servants so that, in Speaker McCormack's words, "the full benefit of this expanding program will accrue to private enterprise":

> "According to NA[S]A witnesses, *the contemplated expansion of functions under the new agency will take place largely by means of contract work rather than through research conducted by the agency itself.* At present, the NA[S]A employs approximately 8,000 people. The NA[S]A witnesses estimated that the increase in agency personnel would not be more than several hun-

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[11] Representative Keating, a member of the House Select Committee on Astronautics and Space Exploration, stated that:

> "You will also find that the bill vests sufficient concentration of authority in a single Administrator to give that office the ability to move with decision and dispatch—in short, to get the job done. This is highly important, for a minimum of redtape—in light of the speed of modern-day communications and development—is an absolute must. The Space Administrator's hands cannot be tied if we expect to get results from our space program." 104 Cong. Rec. 9928 (1958).

See also 104 Cong. Rec. 11295 (1958) (remarks of Senator Bridges).

> dred. Even with considerable allowance for error in their estimate, it seems likely that the number of new Federal employees in the near future will be relatively small. *In other words, the full benefit of this expanding program will accrue to private enterprise.*" 104 Cong. Rec. 9918 (1958). (Emphasis supplied.)

Based on this clear intention, Congress gave NASA in Section 2473(b)(5) the broadest power to contract for support services. The 1958 bill provided simply, and without proviso, limitation, or qualification, that NASA was empowered "to enter . . . such contracts . . . as may be necessary . . . with any [federal or state agency] . . . or with any person, firm, association, corporation, or educational institution" and on such terms "as [NASA] deems appropriate." Indeed, this grant of power was viewed as so expansive that the House Select Committee considering the bill was concerned with its breadth and stated that:

> "This very important and far-reaching grant of power deserves more study." House Select Comm. on Astronautics and Space Exploration, H.R. Rep. No. 1758, 85th Cong., 2d Sess. 50 (1958).

Nevertheless, the basic provision was enacted into law without change (a provision recognizing small business was added).

In short, contrary to petitioners' assertions, there is full support for the Court of Appeals' conclusion that "specific statutory authority" exists for NASA to have entered into the support service contracts in issue here. (Appendix, p. 15a.)

B. THE COURT OF APPEALS CORRECTLY HELD THAT NOTHING IN THE SPACE ACT OR THE FEDERAL CIVIL SERVICE LAWS RENDERED THE SUPPORT SERVICE CONTRACTS IN ISSUE HERE UNLAWFUL

Petitioners contend that the Court of Appeals erred because the Federal civil service laws and section 2473(b)(2) of the Space Act render the MSFC support service contracts in issue here unlawful. Once again, however, this assertion will not withstand scrutiny and affords no basis for review of the Court of Appeals' decision.

1. Neither Section 2473(b)(2) of the Space Act nor the Federal Civil Service Laws Render Support Service Contracts Unlawful Per Se

As the Court of Appeals held, there is nothing in either Section 2473(b)(2) of the Space Act or the Federal civil service laws which renders support service contracts unlawful.

Section 2473(b)(2) of the Space Act, 42 U.S.C. § 2473(b)(2), provides as follows:

> "In the performance of its functions . . . [NASA] is authorized— . . .
>
> "(2) *to appoint and fix the compensation of such officers and employees as may be necessary* to carry out such functions. *Such officers and employees shall be appointed in accordance with the civil-service laws* and their compensation fixed in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, except that (A) to the extent the Administrator deems such action necessary to the discharge of his responsibilities, he may appoint not more than four hundred and twenty-five of the scientific, engineering and administrative personnel of the Administration with-

> out regard to such laws, and may fix the compensation of such personnel not in excess of the highest rate of grade 18 of the General Schedule . . . ." (Emphasis supplied.)[12]

On its face, this provision says absolutely nothing about contracting for support services. And, the legislative history of this section makes clear that contracting for support services was never even considered by Congress when Section 2473(b)(2) was enacted. As the Court of Appeals noted, this section of the statute on its face deals with "appointed employees" of NASA, not with contracts, contractors or their employees. (Appendix, p. 14a.)

The Court of Appeals appropriately recognized that sections 2473(b)(2)—dealing with the appointment of civil servants at NASA—and 2473(b)(5)—dealing with contracts at NASA—were not contradictory provisions, but were complementary: "[s]ubsection (b)(5) is more than an exception to subsection (b)(2); it covers a different situation altogether." (Appendix, pp. 14a-15a.) As the Court put it, accepting petitioners' argument that subsection (b)(2) applied to contracts "would effectively read subsection (b)(5) out of the act." (*Id.*, p. 16a n.21.)[13] According to the Court of Appeals:

[12] As the Court of Appeals noted, the exception in subsection (b)(2) relating to 425 "employees" who need not be appointed in the civil service "was intended to enable NASA to recruit qualified scientists, engineers and other personnel on a prompt basis without regard to civil service limitations." (Appendix, p. 10a.) *See* H.R. Rep. No. 1170, 85th Cong., 2d Sess., 1958 U.S. Code Cong. & Admin. News 3178.

[13] As we will show below, petitioners' citation to the Court's decision in *United States* v. *Langston*, 118 U.S. 389 (1886), in support of their case is in error. Indeed, *Langston* supports the

> ". . . the contractors' employees have not been shown . . . to be employees of the United States who must be appointed in accordance with subsection (b)(2) and concomitantly as civil service employees under the civil service laws. This is because subsection (b)(5) validly authorized NASA to enter into separate contracts under which certain services contracted for were performed by employees of the contractor. . . . Subsection (b)(5) need not 'repeal' subsection (b)(2) in order to achieve its separate status. To the extent that it provides for a *specific* manner in which NASA may carry out some of its work, it is a specific exemption from the general provisions of subsection (b)(2) and must be recognized as such." (*Id.*, pp. 29a-30a.) (Emphasis in original.)

The same conclusion follows when one examines the Federal civil service laws. The civil service laws define an "employee" as follows:

> ". . . an officer and an individual who is—(1) *appointed in the civil service* . . . ; (2) engaged in the performance of a Federal function under authority of law or an Executive act; *and* (3) subject to the supervision of an individual named in paragraph 10 of this subsection [*e.g.*, the President] while engaged in the performance of the duties of his position." 5 U.S.C. § 2105. (Emphasis supplied.)

By definition, therefore, a contractor's employee not "appointed" in the civil service is not an "employee" for purposes of the civil service laws.

Court of Appeals' interpretation of these two provisions of the Space Act since, as the Court there noted, "[i]f by any reasonable construction they [statutory provisions] can be made to stand together, our duty is to give effect to the provisions of each." 118 U.S. at 393.

Indeed, this is made even clearer in the statutes and regulations governing RIFs. Congress has directed the Civil Service Commission to "prescribe regulations for the release of *competing employees* in a reduction in force . . ." 5 U.S.C. § 3502(a). (Emphasis supplied.) In addition, Congress has specified that certain civil service employees—called "preference eligibles" [14]—shall be entitled to additional rights in a RIF "in preference to competing employees." 5 U.S.C. § 3502(b).

On their face, these RIF rights relate only to civil service "employees" as defined by law. Indeed, as this Court has held, the employment preference given to civil servants in a RIF is *a limited concept. See Elder* v. *Brannan,* 341 U.S. 277 (1951); *Fass* v. *Gray,* 197 F.2d 587 (D.C. Cir. 1952), *cert. denied,* 344 U.S. 839 (1952); *American Federation of Government Employees* v. *Resor,* 387 F. Supp. 63 (D.D.C. 1974). According to this Court, "the term 'competing' employee . . . necessarily implies that a veteran's preference operates only within a defined group." 341 U.S. at 283.[15]

Thus, these statutes and regulations make clear that nothing in the civil service laws renders support service contracts unlawful. In fact, this very interpretation of the civil service laws has been adopted by the Civil Service Commission. As a Civil Service Commission

[14] A preference eligible employee is defined as a veteran and his immediate family. *See* 5 U.S.C. § 2108(3), 7511.

[15] The petitioners here are, in effect, claiming that they are entitled to appointment to "jobs" held by employees of private contractors in a RIF. However, in *United States* v. *Testan,* 424 U.S. 392 (1976), this Court held that two civil service employees could not challenge their failure to be promoted since, under the civil service laws "one is not entitled to a position until he has been duly appointed to it." 424 U.S. at 402.

Examiner has stated, "[e]ven if a contract entered into by NASA . . . [were] found to be improper, this . . . [would] not make the employees of the private firm Federal employees and thus 'competing employees' under the law . . . ; a Federal employee has no right to displace or 'bump' an employee of the private firm." [16] Indeed, in the very appeals brought by civil service employees affected by the MSFC RIFs in issue here, the Civil Service Commission's Board of Appeals Review stated as follows:

> "A decision to carry out some of its functions by using other than federal civilian employees is a matter solely within the administrative discretion of the agency and the propriety of such a decision is not subject to review or modification by the Civil Service Commission in the adjudication of the reduction-in-force appeal of any federal civilian employee affected thereby." [17]

In sum, neither subsection 2473(b)(2) of the Space Act nor the Federal civil service laws render support service contracts unlawful *per se.*

2. The Court of Appeals Did Not Hold That NASA Appropriation Acts Repealed the Requirements of Section 2473(b)(2)

In an effort to create a conflict with a decision of this Court and better their chances for *certiorari,* petitioners contend that the Court of Appeals rested its decision that support service contracts were lawful on the fact that Congress appropriated funds annually for such contracts and had thereby "repealed" section 2473(b)(2). (Petition, p. 20.) It is contended that this

[16] Joint Appendix, p. 1551.

[17] Joint Appendix, p. 1503.

holding is inconsistent with this Court's opinion in *United States* v. *Langston,* 118 U.S. 389 (1886).

Petitioners' argument is nonsense. ***First,*** as even a cursory reading of the Court of Appeals' opinion shows, the Court of Appeals rested its decision about the legality of support service contracts upon a detailed analysis of the specific provisions and legislative history of the Space Act of 1958, not on any provision in subsequent NASA appropriation acts.

Second, the Court of Appeals nowhere held that NASA appropriation acts "repealed" any provision of the Space Act of 1958. The Court's own words on this subject speak for themselves:

> "Because of this background . . . 'NASA and MSFC officials apparently believed they had a mandate in the law to develop a Government/Industry/Education Space team.' . . . This practice was regularly disclosed to Congress in its budget requests and the resulting appropriations based thereon are an indication of congressional approval. If anything more were needed to approve the practice of using extensive support service contracts, it came in 1971 and 1972 when Congress directed reductions in NASA's *civil service* work force at the same time that it continued to approve its budget requests for funds to meet its obligations under its support service contracts that were in existence." (Appendix, pp. 13a-14a.) (Footnotes omitted.) (Emphasis in original.)

Third, the Court's reference to these appropriations statutes is perfectly appropriate since the fact that Congress was aware of NASA's contracting practices and approved them is significant. As one Court has noted:

> "a consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval." *Kay* v. *Federal Communications Commission,* 443 F.2d 638, 646-47 (D.C. Cir. 1970.)[18]

Thus, there is no basis for petitioners' assertion that appropriation acts were improperly used by the Court of Appeals as a means of "repealing" a federal statute.

C. THE COURT OF APPEALS CORRECTLY HELD THAT THE CONTRACTS IN ISSUE WERE NOT IMPROPERLY ADMINISTERED BY NASA

While holding that support service contracts were not unlawful *per se,* the Court of Appeals recognized that there was an appropriate relationship between subsections 2473(b)(2) and (b)(5) of the Space Act which could render support service contracts unlawful in certain circumstances. As the Court put it, while NASA had broad authority to contract for services, it could not do so in a way to "evade and circumvent" subsection (b)(2) and treat "contractor's employees . . . as employees within the meaning of the civil service

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[18] Petitioners' contention that what the Court of Appeals did is in conflict with *United States* v. *Langston,* 118 U.S. 389 (1886), is without merit. In *Langston,* Congress had appropriated one amount as the salary for a consular official in Haiti. In subsequent statutes, a lower overall appropriation was provided for consular officials. The consular official in Haiti filed suit in the Court of Claims on the grounds that the subsequent appropriation acts had not reduced his salary. The Court agreed, finding as a matter of statutory construction that it was unlikely that Congress intended to reduce the official's salary without having expressly said so in the subsequent statutes.

laws." (Appendix, p. 15a.) According to the Court, the question was:

> "whether the contracts validly entered into under subsection (b)(5) were improperly administered so as to treat the contractor's employees as subsection (b)(2) employees which were required to be appointed in accordance with the civil service laws." (*Id.*, p. 17a.)

We believe that the Court of Appeals was correct in its analysis of the relationship between the two subsections and in answering this question by finding all of the MSFC contracts in issue lawful.

1. The Court of Appeals Applied the Proper Standard for Determining When Contracts are Administered Improperly

It is difficult to ascertain petitioners' precise complaint with the standard used by the Court of Appeals in reviewing the administration of the MSFC contracts, other than the fact that they do not like the result reached by the Court. We believe that the standard used by the Court, applying this Court's decision in *Kelly* v. *Southern Pacific Co.*, 419 U.S. 318 (1974), was clearly correct.

In the first instance, the Court of Appeals held that the determination of whether a contractor's employee was improperly treated by the Government as "an 'employee' within the meaning of the Civil Service laws" turned on the extent of Governmental *supervision* of the contractor's employee. (Appendix, pp. 17a-18a.) This is, of course, the key factor examined for many years by the Civil Service Commission in considering this very issue.[19] It was the key factor examined by the

[19] As the Court of Appeals noted, the Commission set forth its view of the standards applicable to assessing the legality of contract administration in a 1967 opinion by then General Counsel Pellerzi. (Appendix, p. 7a.) This opinion, as clarified by an opinion of a subsequent Commission General Counsel, stressed that supervision of contractor employees by Government personnel was "the *basic criteria* by which this relationship is judged . . . ." (*Id.*, p. 24a.) (Emphasis in original.)

District Court. And, even petitioners would appear to agree that supervision is the key. (Petition, p. 26.)

In determining the appropriate definition of "supervision", the Court of Appeals viewed this Court's decision in *Kelly* v. *Southern Pacific Co., supra,* "as strongly persuasive if not completely controlling on the facts here present." (Appendix, p. 24a.) In *Kelly,* this Court considered a claim under the Federal Employee's Liability Act submitted by an employee of a contractor with a railroad. In its opinion, this Court held that supervision of the contractor's employee by the railroad was the key and that proof of a "master-servant relationship" under common law principles was necessary before an employee of the contractor could be considered an "employee" of the railroad for purposes of the Act. 419 U.S. at 325. According to the Court, the question was whether one employer "controlled or had the right to control the physical conduct of . . . the employees [of the other] in the course of their operations." (*Ibid.*) Based on this standard, the Court of Appeals concluded that, for support service contracts to be rendered unlawful, day-to-day supervision of the physical conduct of contractor employees by Government personnel was required. (Appendix, p. 26a.)

We believe the standard used by the Court of Appeals was wholly correct. It was, of course, completely consistent with this Court's holding in *Kelly.* And, it

makes sense in the present context. As both the Court of Appeals and this Court have recognized, in its contracts with private industry, "the Government may fix specific and precise conditions to implement federal objectives." *United States* v. *Orleans,* 425 U.S. 807, 810 (1976). Likewise, this Court has concluded that contact at the supervisory level between parties to a contract "is not direction or control but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation." *Kelly* v. *Southern Pacific Co., supra,* 419 U.S. at 330.

Thus, any standard applied to assess the legality of supervision by Government personnel over contractor employees must take these wholly legitimate Government requirements into account. If the vice to be prevented is having Government's personnel direct the work of a contractor's employees, a showing of continuous supervision of the physical conduct of a large number of the contractor's employees is the only standard which bears any relationship to this vice. This is precisely the view adopted by the Court of Appeals.

Thus, there is no basis for setting aside the standard of supervision adopted by the Court of Appeals for reviewing the legality of NASA's contract administration.

2. The Court of Appeals Correctly Applied This Standard to the Contracts in Issue

The record before the Court of Appeals was overwhelming that, as found by the Civil Service Commission, improper supervision of contractor employees by NASA personnel did not exist at MSFC. The Court of Appeals' own words say it best:

"The situation here involves NASA entering into written contracts with various companies to perform special services. In each contract, NASA looked to the company that hired the individuals to perform certain tasks. However, the individual companies, not NASA, were to furnish the necessary management and personnel. *It was the responsibility of each company to supervise, control, and direct the performance of its own employees in fulfilling the contract's requirements.* These contracts required the companies to exercise their independent judgment. This is the classic independent contractor relationship.

"In actual operation, in those instances which come closest to the employee borderline, NASA generally gave specific orders, usually to the company supervisor, for certain articles and services. '[T]he *contractor* [not his employees] were told what to do, when to do it, how it was to be done, the qualification requirement[s] for his key people, how and when to report [on] activities, etc.' (J.A. 454). But *the cont[rol] [over] the performance of such requests and the r[esponsibili]ty for the manner in which they would be carried out was in the contracting party and its supervisors.* Thus, the specificity of the requests did not transcend the fact that the *actual on-the-spot supervision employed to produce compliance was carried out by the contracting company and its employees* . . . . This was particularly apparent in a great many of the contracts here because a substantial portion of the contractually acquired services which are in question involved scientific, engineering, technical, and other highly skilled or professional personnel who were fully capable of exercising independent judgment in performing their services and were expected to do so." (Appendix, pp. 21a-22a.) (Emphasis in part in original and in part supplied.)

Petitioners raise no facts in the record below to dispute these findings. Indeed, the record below is unquestioned that:

(a) NASA issued very specific directives to its own personnel precluding supervision of contractor employees. As the Civil Service Commission found, each Federal official responsible for the operation of a support service contract at MSFC was expressly directed by NASA to:

> "Prevent employer-employee relationships between Government Technical Representatives and contractor employees including:
>
> (1) Government personnel interviewing prospective contractor employees;
>
> (2) Work assignments made directly to contractor personnel by the Government representatives and interim direction and control of such work except as between the Government's and the contractor's supervisors;
>
> (3) Interference with the contractor's personnel administrative prerogatives; and
>
> (4) Approval of time cards and absences of contractor employees by Government representatives." (*E.g.*, Joint Appendix, p. 646.)

(b) The evidence was uncontroverted that the foregoing contract provisions were obeyed by NASA personnel in the administration of the MSFC contracts. After conducting numerous on-site inspections and collecting hundreds of affidavits, there was not a single support service contract at MSFC in which the Civil Service Commission found *any* evidence that civil service employees directly supervised the performance of contractors' employees. Indeed, many of the reports

prepared by the Commission contained an express finding to the effect that:

> "In the course of this inquiry no evidence of day to day supervision by Government personnel over contractor employees was found." (Joint Appendix, p. 685.)

As the Commission noted in one of its reports, "[d]irect supervision by civil service personnel over contractor personnel or vice versa is known by both sides, *i.e.*, contractor and civil service, to be improper . . . ." (Joint Appendix, p. 1021.)

3. The Court of Appeals did not Abdicate Its Judicial Responsibility to the Civil Service Commission

In another of their efforts to create an inflammatory issue, the petitioners assert that the Court of Appeals improperly abdicated its judicial responsibility by relying on the investigation of the legality of the MSFC contracts conducted by the Civil Service Commission, instead of coming to a judicial resolution of the contracts' legality. (Petition, pp. 22-24.) It is asserted that this conflicts with *Wheelabrator Corp.* v. *Chafee,* 455 F.2d 1306 (D.C. Cir. 1971), and the Administrative Procedure Act. Once again, however, the petitioners' argument is without foundation.

First, as a review of the Court of Appeals' opinion shows, the Court's conclusion with respect to the legality of the MSFC contracts was, in the first instance, based on the Court's own exhaustive analysis of the record and *not* on the conclusions of the Civil Service Commission.

Second, the Court did not abdicate any judicial responsibility to the Commission. Instead, as an alter-

native holding, the Court of Appeals concluded that the District Court had no basis for disregarding the Commission's actions. As the Court of Appeals found, citing its own decision in *Wheelabrator,* "[t]he district court was not required to send this matter to the Civil Service Commission, but it chose to do so in an exercise of its discretion." (Appendix, pp. 27a-28a.) Having done so, the Court of Appeals concluded that the District Court was not free simply to disregard the Commission's well-supported findings and conclusions that improper supervision did not exist. Instead, the Court reasoned that since there was "substantial support in the record for the Commission's conclusions" as to the contracts, the District Court should have followed those conclusions. (*Id.,* p. 29a.)

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-96

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., *Petitioners*

v.

ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., *Respondents*

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES, *Intervenor-Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

Petitioners hereby respectfully submit the following reply to the briefs filed in opposition to the petition for writ of certiorari herein on behalf of federal respondents and National Council of Technical Service Industries (NCTSI).[1]

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[1] The brief on behalf of federal respondents was not received by counsel for petitioners by mail until October 11, 1978 albeit it was apparently filed with the Court on October 3, 1978.

I

THIS CASE PRESENTS AT LEAST TWO ISSUES OF OVERWHELMING IMPORTANCE TO THE ENTIRE FEDERAL CIVIL SERVICE SYSTEM AND TO THE OPERATION OF NASA UNDER ITS FEDERAL ENABLING STATUTE—QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, ESPECIALLY IN LIGHT OF THE TWO CONFLICTING COURT OF APPEALS DECISIONS IN THIS CASE ITSELF

Federal respondents argue in their brief that the issues involved in this case are unexceptional, and accordingly, there is no reason for review by this Court. Petitioner respectfully submits that contention is patently untrue.

This case squarely raises the following issues of vital, overwhelming importance to the entire federal civil service system and to the operation of the National Aeronautics and Space Administration (NASA) under its federal enabling statute—the National Aeronautics and Space Act of 1958, as amended:

1. Is NASA specifically required by its federal enabling Act (42 U.S.C. 2473(b)(2), now (c)(2)) to employ all but 425 regular civilian employees under the Civil Service laws and to pay them in accordance with the Classification Act of 1949, as amended?

2. Is NASA required, like other civilian departments and agencies of the Federal Government, to perform its regular civilian work functions with employees appointed and employed under the federal Civil Service laws and regulations—or may NASA simply ignore and circumvent those laws and regulations and obtain thousands of regular clerks, secretaries, blue collar workers and other employees it constantly needs to perform its governmental work functions through

the device of making scores of so-called "support service contracts" with private contractors and subcontractors at great additional cost to the Government?

It is extraordinarily imperative for this Court to settle these vitally important *federal questions* in this case, not only because neither question has ever been decided by this Court, but because here the record contains two dramatically conflicting decisions of the same Court of Appeals with reference to these two issues (see *Lodge 1858, AFGE* v. *NASA,* 436 F.2d 882, 892; and *Lodge 1858, AFGE* v. *NASA,* Appendix to petition, pp. 9a, 10a).

II

THE DISTRICT COURT RULED THE NASA SUPPORT SERVICE CONTRACTS FOUND ILLEGAL IN THIS CASE ARE SUBSTANTIALLY IDENTICAL TO THOSE NASA CONTRACTS HISTORICALLY RULED UNLAWFUL BY THE COMPTROLLER GENERAL AND THE CIVIL SERVICE COMMISSION. THUS, UNLESS THIS COURT REVIEWS AND REVERSES THE COURT OF APPEALS' DECISION, WHICH NEGATES BOTH THE DISTRICT COURT'S RULING AND THE GRAVAMEN OF THE COMPTROLLER GENERAL'S AND THE COMMISSION'S PRIOR RULINGS AS WELL, THE GOVERNMENT WILL BE FORCED TO PAY TENS OF MILLIONS OF DOLLARS EACH YEAR IN GROSSLY UNNECESSARY FEES AND CHARGES FOR THE PERFORMANCE OF NASA'S REGULAR GOVERNMENTAL WORK FUNCTIONS BY CONTRACTOR-SUPPLIED EMPLOYEES

Federal respondents' brief grievously misleads the Court by arguing that the NASA support service contracts ruled illegal by the District Court, but legitimized by the Court of Appeals' opinion in this case, are different from the long line of NASA support service contracts previously ruled illegal by both the Comptroller General of the United States and the Civil Service Commission.

That contention is absolutely incorrect and unsupportable, and federal respondents know it. *In fact, the record before this Court contains a formal written agreement executed by federal respondents themselves (and thereafter presented to the District Court) which admits that the NASA support service contracts at the Marshall Space Flight Center challenged in this case are improper and illegal—and on the strength of that concession, federal respondents cancelled 598 of the proposed 764 Civil Service reduction-in-force actions in this case on the ground they were tainted by "improper service contract operations"* (J.A. 188, 189; 1196).

Throughout all subsequent proceedings before the District Court, that Court carefully adopted and applied the same rules and standards the Comptroller General and the Commission had previously applied in NASA contract cases to support its rulings that certain of the NASA contracts in this case, which are substantially identical to those theretofore ruled unlawful by the two watchdog Government agencies, are likewise unlawful (see Supp. App. to petition, pp. 9; 18-21; 25-27; 33-34; 39). The District Court ruled that the NASA contracts found illegal in this case are *"strikingly similar"* to the NASA contracts historically ruled illegal by both the Comptroller General and the Commission (see Supp. App. pp. 39-40; 84-85).

By completely rejecting the legal and factual bases for the District Court's rulings in this case (which are substantially identical to those upon which the Comptroller General and the Commission relied in the prior cases), *the two-Judge Court of Appeals has literally opened the floodgates for private support service contractors, and has exposed the Government to the continuing loss of tens of millions of dollars each year in contractor fees and charges for merely supplying non-Civil Service employees to perform regular, everyday governmental work functions for NASA and other federal agencies that could readily be performed by regular government employees.*

In June, 1967, for example, the Comptroller General audited only three (3) NASA support service contracts at the Marshall Space Flight Center out of a total of eleven (11) then in effect (J.A. 270). The total *annual cost* to the Government of the eleven (11) contracts was $69.9 million (J.A. 270). The *annual cost* of the three (3) audited contracts was $24.4 million (J.A. 270). The Comptroller General not only concluded the three (3) audited contracts were unlawful, but that same resulted in a tremendous waste of Government money. He stated in his report to Congress (J.A. 270):[2]

> "Our comparison of costs showed that annual savings of about $4.8 million could have been achieved if the . . . services being obtained under contract in support of the three (NASA-MSFC) laboratories covered by our review were to be performed by civil service employees."

The Comptroller General's ruling then concluded (J.A. 291):

> "We believe that the results of our review clearly indicate that savings of some significance can be

[2] Comptroller General's Report To The Congress, No. B-133394, dated June 9, 1967, entitled, "Potential Savings Available Through Use of Civil Service Rather Than Contractor-furnished Employees for Certain Support Services—National Aeronautics and Space Administration."

achieved at MSFC and GSFC (Goddard Space Flight Center) if the services covered by our review are carried out by civil service employees rather than contractor personnel. Also, . . . it appears that additional savings could be achieved by NASA at MSFC and other centers."

Earlier, in 1964, the Comptroller General audited a selected NASA support service contract at the Goddard Space Flight Center near Washington, and specifically concluded, as the District Court did in the case at bar (J.A. 258, 259):[3]

> "We believe that the manner in which the operations under contract NAS 5-2078 . . . was carried out clearly showed that the terms of the contract intended that *the employees furnished to GSFC under the contract be controlled by the Government to substantially the same extent as civil service employees. This contractual arrangement resulted in a violation of the statutes governing Federal employment.*
>
> "The cost of the services procured under NAS 5-2078 was . . . *40% in excess of the cost that would have been incurred if the services had been performed by civil service employees who were subject to the Classification Act of 1949, as amended.*" [Italics supplied.]

Patently therefore, this Court's review of the vitally important federal questions presented by this case is totally essential. The Comptroller General, the Civil Service Commission, the Court of Appeals in 1970, and

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[3] Comptroller General's Report To The Congress, No. B-133394, dated October 19, 1964, entitled, "Violation of Statutes Governing Federal Employment and Excess Costs Incurred Under a Contract For Technical Writing and Related Services Awarded by the Goddard Space Flight Center—National Aeronautics and Space Administration."

the District Court have all decided that both NASA's organic statute and the federal Civil Service laws protect the United States against the huge waste of federal funds involved in scandalous private contractor raids on the Treasury when NASA enters into the type of support service contracts present in this case. A two-Judge Court of Appeals has erroneously ruled diametrically opposite on each and every point. A federal issue of this magnitude must be settled by the Supreme Court of the United States.

III

THE DISTRICT COURT, WHICH IS THE FACT-FINDER IN THIS CASE, METICULOUSLY CONSIDERED ALL THE EVIDENCE AND, LIKE THE COMPTROLLER GENERAL AND THE COMMISSION IN PRIOR CASES, CONCLUDED THAT UNDER MOST OF THE CHALLENGED NASA CONTRACTS, CONTRACTOR-SUPPLIED EMPLOYEES ARE ESSENTIALLY EMPLOYEES OF THE GOVERNMENT TO THE SAME EXTENT AS CIVIL SERVICE EMPLOYEES, AND THAT SUCH CONTRACTS VIOLATE NASA'S ORGANIC STATUTE AND THE FEDERAL CIVIL SERVICE LAWS. THE COURT OF APPEALS BLINDLY AND ERRONEOUSLY REVERSED THOSE FINDINGS, AND THUS EFFECTIVELY OVERRULED NOT ONLY THE DISTRICT COURT'S DECISION IN THIS CASE, BUT THE PRIOR DECISIONS OF THE COMPTROLLER GENERAL AND THE COMMISSION AS WELL

Federal respondents' brief contends that petitioners do not challenge the Court of Appeals' decision to the extent it holds that, in this case, contractor-supplied employees were in no sense the equivalent of regular federal employees. On the contrary, petitioners vigorously contend that, in this regard, the Court of Appeals plainly erred—and that its holding threatens not only huge financial losses for the Government, but ultimate destruction of the federal civil service system

as well. Moreover, as stated above, by so ruling the Court of Appeals has effectively overturned all prior decisions of the Comptroller General and the Civil Service Commission in this area.

The Court of Appeals' decision is clearly wrong because, first, it completely ignores the fact that, at the very outset of this case, federal respondents themselves agreed that many of the NASA support service contracts still challenged in this case, when measured by the prior rulings of the Comptroller General and the Commission, were improper and unlawful (J.A. 188, 189; 1196).

Secondly, the Court of Appeals is wrong because its decision ignores the further fact that, *in this very case, the Commission's investigators (even though outrageously influenced and misled by counsel for federal respondents) reported to the District Court that most of the NASA support service contracts challenged in this case violate 5 out of 6 standards previously established by the Comptroller General and the Commission to judge contract illegality* (J.A. 504, 515-517). Thus, federal respondents' investigators unanimously reported to the District Court that *21 of the 32 NASA contracts challenged in this case meet 5 out of 6 standards for contract illegality* (J.A. 504, 515-517).

Ergo, the investigators' report in this case proves beyond peradventure that under no less than 21 of the 32 NASA contracts at issue, contractor-supplied employees, like regular civil service employes at MSFC—

(1) perform their duties for NASA *"on site"* at MSFC, *side-by-side and intermingled with regular civil service employees and in competition with civil service employees* (J.A. 516-518);

(2) perform their duties with *Government-supplied equipment, supplies and space furnished by the Government on the same basis as that supplied to regular, competing civil service employees* (J. A. 516-518);

(3) perform duties which, *like that performed by competing civil service employees, are part and parcel of NASA's regular governmental functions,* and thus their work is the same as or complementary to that performed by competing civil service employees in pursuit of NASA's integrated work at MSFC (J. A. 516-518);

(4) perform duties which are *the same or comparable to those performed by competing civil service employees* (J. A. 516-518); and

(5) perform their duties *pursuant to arrangements with the employer, NASA, which extend beyond one year—indeed for several years* (J. A. 516-518).

The *sole* point of difference between the District Court's ultimate finding of contract illegality and the investigators' conclusions is in the area of *whether contractor-supplied employees at MSFC actually performed their duties subject to "Government supervision" or merely subject to "contractor supervision."* In this regard, the District Court ruled (Supp. App., pp. 57, 58):

> "In each of these . . . contracts, the Commission concluded that all Pellerzi Elements are present except the sixth—Government Supervision. As to that element, this Court found . . . that *the test which should have been applied is one which necessitates a showing that the inherent nature of the services, or the manner in which they are provided, reasonably requires, directly or indirectly, federal direction or supervision of contractor employees.*

"Moreover, '*the criteria must be realistically applied* and the end-point determination reached on the basis of the over-all substance of the contract operations.' *This realistic approach extends both to the terms of the contract, as well as to the method of performance* thereunder. In this regard, the Court finds that the early contracts are basically standard in form and essentially identical to those reviewed in the Pellerzi [Civil Service Commission] Opinion. The more restrictive and objectionable provisions have either been eliminated from the current contracts entirely, or incorporated into the Request for Proposal. Significantly, however, and as the Commission found, the manner of operation under the current contracts has remained largely unchanged.

"*When properly applied, the sixth Pellerzi [Commission] Element was, and is, present to a substantial degree in each of the . . . contracts analyzed above. Accordingly, notwithstanding attempts to program the contracts to avoid the appearance of an employer-employee relationship between NASA and contractor non-civil service employees, this Court concludes that each of the contracts reviewed above established the proscribed relationship and therefore was, and is, null and void.*" [Italics supplied.]

The District Court's ruling, of course, was predicated directly on the several prior rulings of the Comptroller General and the Civil Service Commission, and regarding the question of whether a contractor-supplied employee working at MSFC is, in fact and in law, subject to the supervision of federal supervisors, the Civil Service Commission's controlling opinion rendered in 1967 stated (J. A. 325-330):

"As stated in *Singer Mfg. Co.* v. *Rahn*, 132 U.S. 518, 523, 10 S. Ct. 175, 33 L. Ed. 440 (1889); ' . . .

the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the results to be accomplished, or in other words, 'not only what shall be done, but how it shall be done'.'

"For evidence of the existence or absence of [NASA's] right to direct or control the work of contractor employees, we look first to the terms of the contracts; then at operations under the contracts; and finally, at what the courts have held in construing the relationship established by contracts similar to the contracts we are reviewing here."

Having examined NASA's support service contracts and operations thereunder in depth, the Commission concluded (J. A. 328-330):

"On this basis, that the terms of the contract are strictly complied with, we ask this question: what discretion does a contractor supervisor have after he receives a task assignment or a technical direction from the Federal official? Does he have authority to decide whether or not to pass the task assignment or technical direction on to the contractor technicians? Does he have authority to modify or change the task assignment or the technical direction in any way? *The answers are clear; the contract supervisor has no such discretion under the terms of the contracts.*

"Who then is controlling or directing the work of the contractor technician; the contractor supervisor who delivers the message or the Federal official who sends the message? *It cannot be the contractor supervisor, even though he may assign different parts of the task to different workers . . . he cannot change the substantive direction that comes from the Federal official. . . .*

"*In our review of operations under these contracts it became even more evident that contracts like these cannot be performed unless the civil servants who are supported on the job have the right to direct the work of the contractor technicians. . . . We find no material difference in the degree of actual direction or control exercised over civil service technicians and that exercised over contractor-supplied technicians of the same class. . . .*

"It seems apparent that the contractor supervisor is merely a *pro forma* supervisor. When this appears, the Comptroller General has stated: "*We must emphasize here that the supervision over the individuals performing the work required under a contract remains in the hands of Government personnel even if the contract provides an additional employee to act as supervisor and relay instructions of Government personnel to other contractor-furnished personnel,* and that the test of supervision by Government personnel must be applied to a contract as it operates even though its terms do not call for supervision' (44 Comp. Gen. 761, 763 (1965)). We agree." [Italics supplied.]

Whereas the District Court studiously and meticulously adhered to the aforementioned rules established by this Court in *Singer Mfg. Co.* v. *Rahn,* 132 U.S. 518, 523, 10 S.Ct. 175, 33 L.Ed. 440 (1889) and by the Comptroller General and Civil Service Commission as aforesaid, the Court of Appeals went completely off on its own—and totally contrary to the voluminous, detailed factual record in this case—ruled (App., p. 26a):

"The contracts here were arms-length transactions . . . . [T]he 'day-to-day supervision of the 'physical conduct' on the 'details of the job performed by the individual [employees of the contractor] was in the independent contractor . . . . [W]e find that the standard used here by the trial court was 'too broad'."

Patently, this ruling by the Court of Appeals is totally at odds with the rules historically applied by both the Comptroller General and the Civil Service Commission to determine when contractor-supplied employees are, in effect, federal employees and thus employed in violation of both NASA's organic statute and the entire mass of federal employee legislation. Moreover, in its departure from the established rules, the Court of Appeals' opinion exposes the Treasury of the United States to an unprecedented raid by scores of greedy private contractors anxious to earn huge fees and profits for simply supplying non-Civil Service employees to perform NASA's and other federal departments' regular everyday governmental work functions.

There is nothing in *Kelley* v. *Southern Pacific Railway Co.,* 419 U.S. 318, 95 S.Ct. 472, 42 L.Ed.2d 498 (1974) to justify such a tremendous, costly departure in the federal service. Indeed, in *Baker* v. *Texas & Pacific R. Co.,* 359 U.S. 227, 79 S.Ct. 664, 3 L. Ed. 2d 756 (1959), this Court ruled that each case involving asserted employer-employee relationships must be decided on its own peculiar facts and "ordinarily no one feature of the relationship is determinative." Furthermore, this Court's decision in *Kelley, supra,* was limited exclusively to a construction of the Federal Employees' Liability Act, and in no sense did this Court establish some rigid rule intended to permit free-wheeling federal agencies and hordes of private contractors effectively to circumvent all prohibitions contained in NASA's organic statute and the Civil Service laws, and to saddle the Federal Government with tens of

millions of dollars of unnecessary contractor fees and charges each year solely to supply regular civilian employees readily available through the Civil Service system.[4]

CONCLUSION

The petition for certiorari in this case is well founded; vitally important to both the Federal Government and its employees; urgently necessary to the correction of a clearly erroneous, far sweeping decision of a two-Judge Court of Appeals; and therefore it should be granted.

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[4] Also, in *Kelley*, this Court went to great lengths to emphasize, at 419 U.S. 325: "Nothing in the District Court's findings suggests that petitioner was sufficiently under control of respondent to be either a *borrowed servant* of the railroad or a *dual servant* of the railroad and PMT." Here, the record is replete with evidence, and the District Court specifically found that the contractor employees are *necessarily always under the control of NASA*, so much so that, in truth, they actually serve as employees of NASA to perform NASA's work, *not* the contractor's work. Here, NASA must daily exercise *both supervision and control over all contractor employees whose sole function is to perform NASA's work at MSFC.*